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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VINTERO CORPORATION,

Petitioner,

v.

CORPORACION VENEZOLANA DE FOMENTO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals improperly intrude upon the priority scheme of the Bankruptcy Act by allowing the holder of an unperfected non-recourse security interest to assert a general claim in bankruptcy where the Court of Appeals previously ruled that the debtor did not engage in any fraudulent conduct?

LIST OF PARTIES

All parties to the proceeding in the court whose judgment is sought to be reviewed are:

VINTERO CORPORATION,

Petitioner,

v.

CORPORACION VENEZOLANA DE FOMENTO,

Respondent.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Authorities	iii
Opinions Below	1
Statement of Grounds of Jurisdiction	2
Statutes and Regulations Involved	2
Statement of the Case	6
A. Introduction	6
B. Underlying Transaction	8
C. Bankruptcy Court Complaints	10
(1) The Santa Rosa	10
(2) Bonaire Star	11
D. District Court Action (Fraud Claim)	12
E. District Court Appeal (Bankruptcy Complaints)	13
F. Appeal to the Circuit Court of Appeals (Bankruptcy Court Complaints)	14
Reasons for Granting the Writ	15
Preliminary Statement	15
I. THE CIRCUIT COURT OPINION UNDERMINES THE PRIORITY STRUCTURE OF THE FEDERAL BANKRUPTCY LAWS	17
II THE CIRCUIT COURT OF APPEALS FAILED TO GIVE PROPER EFFECT TO THE MEANING OF THE NON-RECOURSE TERM	21
CONCLUSION	25

TABLE OF AUTHORITIES

Cases	Page
In re Advance Printing & Litho Co., 277 F. Supp. 101 (W.D. Pa. 1967), *aff'd per curiam*, 387 F.2d 952 (3rd Cir. 1967)	19
Brodheim v. Chase Manhattan Bank, N.A., 75 Misc.2d 285, 347 N.Y.S.2d 394, 13 UCC Rep. 139 (Sup. Ct. N.Y. Co. 1973)	23
Matter of Columbia Ribbon Co., 117 F.2d 999 (3d. Cir. 1941)	19
Corporacion Venezolana de Fomento v. Vintero Sales Corp., 452 F. Supp. 1108 (S.D.N.Y. 1978)	12
Corporacion Venezolana de Fomento v. Vintero Sales Corp., 76-1671 (S.D.N.Y. Feb. 13, 1979)	12
Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786 (2d Cir. 1980)	12
Corporacion Venezolana de Fomento v. Vintero Sales Corp., 76-1671 (S.D.N.Y. Dec. 22, 1982)	13
Corporacion Venezolana de Fomento v. Vintero Sales Corp., 712 F.2d 33 (2d. Cir. 1983)	13
Frank LeRoux, Inc. v. Burns, 4 Wash. App. 165, 480 P.2d 213, 8 UCC Rep. 818 (Wash. 1971)	23
In re Harms, 10 B.R. 817, 821 (Bankr. D. Co. 1981)	20
In re Harvest Milling Co., 221 F. Supp. 836 (D.Ore. 1963)	19
Luther v. United States, 225 F.2d 495 (10th Cir. 1955)	19
In re Modern Office Supply, Inc., 28 B.R. 943, 944, (Bankr. W.D. Okla. 1983)	20
In re Mammoth Mart, Inc., 536 F.2d 950, 953 (2d. Cir. 1976)	17
Pepper v. Litton, 308 U.S. 295 (1939)	18

	Page
Sampsell v. Imperial Paper Board, 313 U.S. 215 (1941)	18
Stern v. Itkin Bros., Inc., 87 Misc. 2d 538, 358 N.Y.S.2d 753 (Sup. Ct. N.Y. Co. 1975)	22
Taylor v. Standard Gas and Electric Company, 306 U.S. 307 (1939)	18
United States v. Killoren, 119 F.2d 364 (8th Cir. 1941)	19
Vintero Corp. v. Corporacion Venezolana de Fomento, 675 F.2d 513 (2d Cir. 1982)	12
In re W.T. Grant Co., 4 B.R. 53, 74 (Bankr. S.D.N.Y. 1980)	18
Westchester Fed. S.&L. Ass'n v. Secor Lake Camp, Inc., 37 A.D.2d 615, 323 N.Y.S.2d 514, Dep't 1971)	22
Statutes	
Bankruptcy Act of 1898	
§ 2(a) (former 11 U.S.C. § 11)	18
§ 64(a) (former 11 U.S.C. § 104)	17
§ 65(a) (former 11 U.S.C. § 105)	17
§ 70(c) (former 11 U.S.C. § 110)	10, 21
§ 342 (former 11 U.S.C. § 742)	8, 20
Other Authorities	
3A *Collier on Bankruptcy*, ¶ 64.02]1] (14th ed. 1977) at p. 2063-2064	18
Uniform Commercial Code Commentary and Law Digest, ¶ 1-102(a)(1) (1st ed 1978)	23, 24
Maryland Uniform Commercial Code	
Md. [Commercial Law] Code Ann. § 1-102(3) (1975)	23
Md. [Commercial Law] Code Ann. § 9-201 (1975)	24
Md. [Commercial Law] Code Ann. § 9-301 (1975)	10

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OCTOBER TERM, 1984

VINTERO CORPORATION,

Petitioner,

v.

CORPORACION VENEZOLANA DE FOMENTO,

Respondent.

Petitioner, Vintero Corporation, respectfully prays that a writ of certiorari be granted to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 29, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 735 F.2d 740 (2d Cir. 1984), and is annexed hereto as Appendix B. The District Court opinion was not reported but is annexed hereto as Appendix C. The Bankruptcy Court order dated November 30, 1981 reducing the claim of the respondent to that sum which represents the net proceeds of the sale of the SS Bonaire Star, as well as the supporting motion papers is annexed hereto as Appendix D.

STATEMENT OF GROUNDS OF JURISDICTION

(i) The judgment sought to be reviewed was entered by the Circuit Court of Appeals of May 29, 1984. App. 2.

(ii) On July 16, 1984, the Circuit Court of Appeals denied a Petition for Rehearing with Suggestion for a Hearing *in banc* which was filed by the petitioner on June 4, 1984. App. 1.

(iii) This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

§ 70(c) of the Bankruptcy Act of 1898 (former 11 U.S.C. § 110(c)) provides as follows:

c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and power of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction.

§ 64 of the Bankruptcy Act of 1898 (former 11 U.S.C. § 104) provides as follows:

§ *64. Debts Which Have Priority.* a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary and expense fund; the filing fees paid by creditors in involuntary cases or by persons other than the bankrupts in voluntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, is recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of the recovery; the trustee's expenses in opposing the bankrupt's discharge or in connection with the criminal prosecution of an offense punishable under chapter 9 of title 18 of the United States Code, or an offense concerning the business or property of the bankrupt punishable under other laws, Federal or State; the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases, and to the petitioning creditors in involuntary cases, and if the court adjudges the debtor bankrupt over the debtor's objection or pursuant to a voluntary petition filed by the debtor during the pendency of an involuntary proceeding, for the reasonable costs and expenses incurred, or the reasonable disbursements made, by them, including but not limited to compensation of accountants and appraisers employed by them, in such amount as the court may allow. Where an order is entered in a proceeding under any chapter of this Act directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding, including expenses necessarily incurred by a debtor in possession, receiver, or trustee in preparing the schedule and statement required to be filed by sections 238, 378, or 483, shall

have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding and in the suspended bankruptcy proceeding, if any; (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purposes of this clause, the term "traveling or city salesman" shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under Chapter 9 of Title 18 of the United States Code, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof which are not released by a discharge in bankruptcy: *Provided, however,* That no priority over general unsecured claims shall pertain to taxes not included in the foregoing priority: *And provided further,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court; and (5) debts other than for taxes owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law or who is entitled to priority by paragraph (2) of subdivision c of Section 67 of this Act: *Provided, however,* That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

§ 9-301 of Md. [Commercial Law] Code Ann. (1975) provides as follows:

§ 9-301. **Persons Who Take Priority Over Unperfected Security Interests; Rights of "Lien Creditor"**

(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of

(a) persons entitled to priority under Section 9–312;

(b) a person who becomes a lien creditor before the security interest is perfected;

(c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business or is a buyer of farm products in ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;

(d) in the case of accounts and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase money security interest before or within ten days after the security interest attaches, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

(4) A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

STATEMENT OF THE CASE

A. INTRODUCTION

This petition for certiorari represents the culmination of eight years of active and bitter litigation between the petitioner Vintero Corporation ("Vintero") and the respondent Corporacion Venezolana de Fomento ("CVF"), an agency of the Venezuelan Government. The litigation has resulted in no less than ten separate opinions emanating from the United States Bankruptcy Court for the Southern District of New York (hereinafter the "Bankruptcy Court"), the United States District Court for the Southern District of New York (the "District Court"), and the United States Court of Appeals for the Second Circuit (hereinafter the "Circuit Court").

The dispute between the parties has its genesis in a 1975 loan transaction wherein CVF guaranteed certain promissory notes issued by Venezolana de Cruceros del Caribe, C.A. ("Cariven"), a Venezuelan corporation. The notes were underwritten and syndicated by a merchant bank which provided various letters of credit for Vintero. Vintero used the letters of credit to purchase and restore two ocean-going vessels for subsequent delivery and sale to Cariven. The project was stopped when CVF began its lawsuit in April of 1976.

Due in large measure to a default by Cariven, CVF, as guarantor, became obligated to honor the terms of its guaranty and pay Cariven's bank creditors. In the meantime, the collapse of the Cariven sale agreement caused Vintero to file a Chapter XI petition with the Bankruptcy Court for the Southern District of New York.

CVF thereafter embarked upon a two front assault against Vintero in order to recoup the monies it advanced under its guaranty. First, CVF instituted an action in the District Court against Vintero and its president, Vincent deLyra, alleging that its guaranty was vitiated by various acts of fraud and other wrongdoing perpetrated by the defendants during the course of the loan transaction. Simultaneously, CVF raised the specter of this alleged fraudulent conduct in the Bankruptcy Court proceedings with respect to Vintero's efforts as a debtor-in-possession to invalidate CVF's unperfected security interest.

After two extensive trials and appeals to the Circuit Court, Vintero and its president, Vincent deLyra, were fully and completely exonerated of all charges, both under the law of the State of New York, and the law and theories of Venezuela. This exoneration, notwithstanding, CVF continued to press its attack against Vintero in the Bankruptcy Court. Despite repeated admonishments by the District Court that Vintero's exoneration must be given full collateral estoppel effect, CVF persisted in alleging that its position in bankruptcy should be improved by reason of Vintero's alleged fraudulent conduct. Although the Circuit Court had, on a prior occasion, affirmed the trial court's findings that Vintero and its president were innocent of all alleged wrongdoing, the same Circuit Court refused to incorporate those prior rulings with respect to its decision on CVF's claim in bankruptcy.

In its most recent opinion, the Circuit Court vacated the prior order and decision of District Judge Robert W. Sweet, dated July 13, 1983, and ruled that CVF retained a general claim in bankruptcy despite the fact that it is the holder of an admittedly unperfected non-recourse security interest which expressly precluded CVF from pursuing a deficiency contractual claim against Vintero in bankruptcy. In an effort to do "equity", the Circuit Court became blind to the intent of the parties to the transaction, and in effect revested CVF with a general claim, although it had previously waived its rights to assert one. The Circuit Court rationalized this ruling upon its perception that

it was doing "substantial justice". The Circuit Court's perception of substantial justice unfortunately begs the undisputed facts of the case, as there was no basis to invoke its equity jurisdiction. Indeed, this decision is clearly inconsistent with the Second Circuit's prior holding which vindicated Vintero of all actionable fraud.

Besides the injustice done to Vintero, the ruling creates an apparent inconsistency in the Second Circuit, and has undermined the priority structure of the Bankruptcy Act. As the court of last resort, Vintero respectfully prays that the Supreme Court grant certiorari in order to bring a sense of harmony to this litigation for the good not only of Vintero, but all other commercial litigants similarly situated who will be affected by a decision which allows the holder of a unperfected non-recourse security interest to participate in bankruptcy.

B. UNDERLYING TRANSACTION

On November 4, 1977, Vintero filed a petition under Chapter XI of the Bankruptcy Act of 1898 (the "former Act")[1], and was thereafter continued in possession and management of its property as a debtor-in-possession pursuant to § 342 of the former Act. When the Chapter XI petition was filed, Vintero's principal assets consisted of two undocumented maritime vessels known as the Santa Rosa and Bonaire Star.

These vessels were initially purchased by Vintero with the intent of refurbishing and restoring the ships and delivering the vessels to Cariven for use as cruise ships. In order to finance the business, Cariven and CVF entered into loan transactions with a merchant banker, and CVF guaranteed this indebtedness.

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[1] Citations to the Bankruptcy Act refer to the Bankruptcy Act of 1898 as amended as distinguished from the Bankruptcy Reform Act of 1978 as amended. The Bankruptcy Reform Act of 1978 applies to all proceedings commenced on or after October 1, 1979; proceedings commenced prior to October 1, 1979, such as the Vintero bankruptcy proceedings herein, are governed by the Bankruptcy Act of 1898. *See*, Pub. L. No. 95-598, § 403(a).

As security for its guaranty, CVF was granted a Uniform Commercial Code non-recourse security interest and lien upon each vessel. The non-recourse nature of the transaction signified that CVF relinquished its underlying contractual claim against Vintero, and instead committed itself to an exclusive action against the debtor's collateral. Each of the security agreements pertaining to the respective vessels contained the following exculpatory clause which expressly limited CVF's rights upon default:

> "Anything to the contrary notwithstanding contained in this mortgage herein referred to, the Mortgagor [Vintero] shall in no event be liable for a money judgment in the event of a default hereunder, it being understood that the mortgagee [CVF] looks to the security provided by this mortgage only, and the lien thereof not, however, to be affected in any way." (App. 63.)

When Vintero initially collateralized the Santa Rosa, the ship was berthed on the James River in Virginia. Thus, in order to properly perfect its security interest, CVF, as a secured party, was required to file a Uniform Commercial Code financing statement with the State Corporation Commission in Richmond, Virginia, since Virginia was the situs of the collateral. CVF duly complied with these filing requirements as financing statements were filed with the appropriate Virginia state agencies on or about May 19, 1975.

Subsequent to the Virginia filing, the Santa Rosa was moved from the James River to the Maryland Ship Building and Dry Dock Company located in Baltimore, Maryland. CVF, as secured party, was duly notified of the transfer of its collateral, but failed to take any action to reperfect its security interest once the vessel changed jurisdictions. This inactivity proved costly since by operation of law CVF's security interest terminated upon its failure to refile financing statements in Maryland within four months after the ship was transferred there. Accordingly, when Vintero filed its Chapter XI petition, CVF was the holder of an unperfected security interest and therefore it was

vulnerable to the exercise of Vintero's avoidance power as a debtor-in-possession under the Bankruptcy Act.

Conversely, CVF was not exposed to the same vulnerability with respect to the Bonaire Star. This vessel never changed locations, and thus CVF financing statements which were filed with the appropriate agencies in Alabama remained valid and enforceable in a subsequent bankruptcy proceeding.

C. BANKRUPTCY COURT COMPLAINTS

(1) THE SANTA ROSA

On June 15, 1981, Vintero commenced an adversary proceeding in the Bankruptcy Court against CVF and Cariven seeking a judgment declaring that CVF's security interest in and to the Santa Rosa was null and void against Vintero as a debtor-in-possession. According to the second count of Vintero's complaint, since the Santa Rosa was inventory for sale, CVF was required to reperfect its security interest within four months from time that vessel left Virginia. CVF's failure to do so was a fatal error and left CVF vulnerable to Vintero's avoidance powers under § 70(c) of the former Act.

Upon a renewed motion for summary judgment, the Bankruptcy Court correctly found that under a combined reading of the Uniform Commercial Code and the applicable bankruptcy statutes, CVF's interest as the holder of an unperfected security interest was subordinate and inferior to that of Vintero as a debtor-in-possession. In pertinent part, the Bankruptcy Court stated:

> "It is equally certain that CVF did not perfect its security interest in Maryland within four months from September 1975, when the vessel was brought into Maryland from Virginia. Accordingly, this security interest, "not re-perfected in Maryland, . . . became unperfected at the end of the four month period . . ." Pursuant to the terms of Maryland's Uniform Commercial Code § 9-301(1)(b), such unperfected security interest is subordinate to the rights of "[a] person who becomes a lien creditor without knowledge of the security interest and before it is perfected."

> We have noted earlier that a debtor-in-possession generally "shall have all the title and exercise all of the powers of a trustee appointed under this title . . ." Since ". . . the trustee acquires that the status of a creditor . . . [existing or hypothetical, then holding a lien] as of the time when the petition in bankruptcy is filed" – at which time the security interest was unperfected in Maryland – CVF's lien is, as a matter of law, subordinated to Vintero's." (footnotes omitted) (App. 59.)

(2) **BONAIRE STAR**

The legal principles which in one breath caused CVF to lose the benefit of its security interest in the Santa Rosa worked to CVF's advantage with respect to the Bonaire Star. Since this vessel never left the jurisdiction of Alabama, CVF's secured position was not challenged in bankruptcy. The Bonaire Star was ultimately sold by order of the Bankruptcy Court with the lien of CVF attaching to the net proceeds of sale subject to a resolution of various maritime liens.

Following the sale of the Bonaire Star, Vintero moved in the Bankruptcy Court for an order reducing and fixing CVF's entire claim, initially filed in the sum of $12,093,261.00. to that amount which represented the net proceeds of the sale of the Bonaire Star. Vintero theorized that the non-recourse security agreements executed by CVF extinguished its residual underlying general claim with respect to the Santa Rosa, and thus CVF's claim in bankruptcy was predicated solely upon its interest in the Bonaire Star. By order dated November 30, 1982, the Bankruptcy Court granted this relief and entered an order reducing CVF's claim to that amount representing the net proceeds of the Bonaire Star.

Thereafter, CVF appealed to the District Court from both Bankruptcy Court orders following a remand by the Circuit Court with instructions to Judge Sweet to consider various equitable arguments raised by CVF to ameliorate its failure to

reperfect its security interest once the vessel left Virginia. *Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513 (2d Cir. 1982). This combined Bankruptcy Court appeal was heard by Judge Sweet in the spring of 1983 after the conclusion of the fraud litigation which was also pending before him. Inasmuch as this lawsuit had a profound impact upon the Bankruptcy Court proceedings, the history of that action will be highlighted below.

D. DISTRICT COURT ACTION (FRAUD CLAIMS)

Paralleling the bankruptcy litigation, was a civil lawsuit commenced by CVF in the District Court seeking declaratory relief finding that its multi-million dollar guaranty was null and void by reason of various acts of alleged fraud perpetrated by Vintero and its principal officer, Vincent deLyra, in concert with the participating banks in the transaction. This action for declaratory judgment was originally heard by District Judge William C. Conner who refused to allow CVF to disavow its guaranties as against the participating banks under a theory that these banks were holders in due course and therefore not subject to the defense of fraud in the inducement. Judge Conner however left undecided the fraud questions against Vintero and deLyra and directed that a trial be conducted on these issues. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F.Supp. 1108 (S.D.N.Y. 1978).

The unresolved questions of fraud were thereafter referred to and tried by the Honorable Robert W. Sweet. After extensive pre-trial discovery and an exhaustive trial, the defendants Vintero and deLyra were both exonerated of all claims of fraud under the law of the State of New York. *Corporacion Venezolana de Fomemto v. Vintero Sales Corp.*, 76-1671 (S.D.N.Y. Feb. 13, 1979). CVF appealed this ruling to the Circuit Court which vacated and remanded the case back to the District Court with instructions to Judge Sweet that under the conflict of law theory of "depecage", the fraud claims asserted against the defendants must be tried under the law of Venezuela instead of the law of New York. *Corporacion Venezolana de Fomemto v. Vintero Sales Corp.*, 629 F.2d 786 (2d Cir. 1980).

In conformity with that decision, the parties again convened before Judge Sweet for a second trial, this time employing the laws of Venezuela. Once again, Vintero and deLyra prevailed on the merits and were cleared of all allegations of fraud. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, No. 76-1671 (S.D.N.Y. Dec. 22, 1982). Judge Sweet's findings under Venezuelan law were ultimately affirmed by the Circuit Court of Appeals by opinion dated July 8, 1983. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 712 F.2d 33 (2d Cir. 1983).

The second appellate decision by the Circuit Court is noteworthy in that it directly impacts upon the issues initially raised in the Bankruptcy Court. In particular, the Circuit Court made specific reference of the fact that Vintero itself expended in excess of $1,000,000.00 more that what was advanced under the letters of credit to refurbish and renovate the vessels. Throughout the course of the litigation, both in the Bankruptcy Court and the District Court, CVF raised the hollow specter that Vintero uitlized only a small percentage of the $8,000,000.00 advanced under the various letters of credit and that as a result there was approximately $5,000,000.00 in unaccounted funds.

These allegations, however, were belied by documentary evidence introduced at trial which indicated that as of October, 1978, Vintero had utilized all of the monies advanced under the letters of credit and in fact expended an excess of $1,000,000,00 of its own funds, independent of CVF, to maintain the vessels. Ironically, *it was CVF*, and not Vintero, which introduced into evidence the "Recapitulation Statement" outlining the expenditures made on the vessels. Furthermore, this evidence did not take into account expenditures which Vintero has made subsequent to that time. For the last eight years, Vintero has shouldered full responsibility for the care and maintenance of the Santa Rosa without any assistance from CVF, and these costs have been substantial.

E. DISTRICT COURT APPEAL (BANKRUPTCY COMPLAINTS)

After the appeals were exhaused in the fraud litigation, the parties refocused their attention upon CVF's alleged secured

claim in and to the Santa Rosa. On appeal to the District Court, CVF challenged the invalidity of its security interest on the ground that a constructive trust and/or quasi-contract terms should be implied to ameliorate the consequences of its lapsed filing. Secondly, CVF argued that the Bankruptcy Court misconstrued the meaning of the non-recourse term and that its security interest, although unperfected, nevertheless should attach to the proceeds of the Santa Rosa, assuming that the ship is sold.

The District Court quickly disposed of CVF's equitable claims that a constructive trust should be imposed, noting that Vintero had been exonerated of all fraud, and thus there was no factual basis for the imposition of this relief. Similarly, the District Court affirmed the prior Bankruptcy Court order which reduced CVF's claim to the net proceeds of the Bonaire Star after the payment of various maritime liens. Giving full effect to the terms of the parties' security agreement, the District Court held that once CVF's security interest became unperfected, it lost all rights in and to the Santa Rosa by reason of the *non-recourse* language. (*See* Appendix B App. 9-21) In pertinent part, Judge Sweet stated:

> "The non-recourse term of the security agreement is clear: The exculpatory language agreed to by CVF precludes CVF from asserting a general claim in bankruptcy. When sophisticated parties, dealing at arm's length, execute a 'non-recourse' chattel mortage, there is no valid reason to deny enforcement of their bargain. Accordingly, the Bankruptcy Court's order expunging order CVF's general claim should be affirmed as it merely gives full effort to the express terms of the parties' security agreement." (App. 21)

F. APPEAL TO THE CIRCUIT COURT OF APPEALS (BANKRUPTCY COMPLAINTS)

Abandoning its argument that it was a secured creditor of Vintero, either on a legal or equitable basis, CVF appealed to the Circuit Court from so much of Judge Sweet's decision which limited CVF's general claim in bankruptcy to the net proceeds of the Bonaire Star.

Vintero argued before the Circuit Court that CVF's current predicament in bankruptcy could be directly attributed to its unilateral negligence in failing to refile a financing statement once the Santa Rosa left Virginia. Moreover, counsel drew attention to the fact that Vintero and its president were completley exonerated of all allegations of wrongdoing with respect to the transaction. Accordingly, there was no factual basis to deny enforcement of the non-recourse security agreement as written.

CVF, on the other hand, pressed its appeal on the theory that both lower courts wrongly interpreted the meaning of the non-recourse clause. CVF argued that the chattel mortgage provided security for CVF's guaranty even if the security interest was unperfected. For this proposition, CVF directed the Circuit Court's attention to a line of authorities which limited themselves to a recital of the principle that an unperfected security interest remains valid as between the parties, without any analysis of the particular distinguishing facts in this case, namely, the implications of the non-recourse term in bankruptcy.

Fearing that Vintero would somehow gain an undeserved windfall, the Circuit Court vacated Judge Sweet's prior order and held that CVF's security interest, although unperfected, shall nevertheless attach to the proceeds of the Santa Rosa assuming that the ship is sold in order "that substantial justice" is done in the case. Vintero filed a petition for a hearing with suggestions for a hearing *in banc*, but this petition was denied on July 16, 1984.

REASONS FOR GRANTING THE WRIT

PRELIMINARY STATEMENT

Despite the Supreme Court's reluctance to become involved in commercial disputes, this case nevertheless raises important questions regarding the treatment of claims under the federal bankruptcy laws and therefore requires further appellate review. The record below presents a particularly striking example of impermissible judicial encroachment upon well founded commercial principles and contractual relationships.

The Circuit Court was asked to interpret and give effect to a non-recourse security agreement which expressly precluded CVF from asserting a deficiency contractual claim in bankruptcy. Under the circumstances of this case, CVF committed itself to an exclusive remedy against the debtor's collateral. By virtue of the non-recourse term, its rights in the Vintero bankruptcy proceeding were tied directly to the strength of its security interest. Once this security interest fell victim to Vintero's avoidance powers as a debtor-in-possession, CVF was foreclosed from looking to the underlying contractual obligation for any relief. Although the non-recourse nature of the transaction represented a potential obstacle to CVF in bankruptcy, this was nonetheless the bargain of the parties, freely negotiated through sophisticated counsel. There was no pressure placed upon CVF to execute a non-recourse security agreement; it did so voluntarily. Creditors dealing with Vintero in later transactions knew of the non-recourse nature of the CVF loan and justifiably relied upon the proper enforcement of this security agreement.

Both lower courts appreciated the non-recourse character of the transaction. However, the Circuit Court apparently ignoring the results of prior litigation, unjustifiably took it upon itself to redefine the parties' relationship so as to render the non-recourse term meaningless. The Circuit Court held that notwithstanding the lapsed perfection, CVF's security interest would attach to the "proceeds of collateral, but such security interest shall not entitle CVF to priority as against Vintero's other creditors." (App. 8.) In an effort to minimize the impact of such a ruling upon the rights of other general creditors, the court relegated CVF's claim to the status of a general creditor. This treatment, however, does not go far enough to prevent harm to Vintero's other creditors. Indeed, it is nonsensical to believe that general creditors will not be adversely affected by the introduction of an alleged CVF claim of several million dollars. These claims are hardly insubstantial as the Federal Deposit Insurance Company has filed a proof of claim in the sum of $589,483.09.

To the extent that general creditors are adversely affected, the decision erodes the priority structure of claims as codified

by § 64(a) of the former Act. The Circuit Court has *sua sponte* created a new class of general creditor in this case by sanctioning CVF's participation although it has failed to properly perfect its security interest, after bargaining away its right to assert a general claim. In short, the Court below has manufactured a general creditor from thin air to the detriment of other creditors in this proceeding. This encroachment mandates that the Supreme Court grant certiorari to further review this case.

I.

THE CIRCUIT COURT OPINION UNDERMINES THE PRIORITY STRUCTURE OF THE FEDERAL BANKRUPTCY LAWS

In its decision below, the Circuit Court improperly intruded upon the priority scheme as established by § 64 of the Bankruptcy Act by allowing CVF to share *pari passu* with Vintero's other general creditors.

Equality of distribution is the watchword under the Bankruptcy Act, and this theme has been carried over to the Bankruptcy Reform Act of 1978. Section 65(a) of the Act provides that "dividends of an equal percentum shall be declared and paid on all claims except such claims as have priority." Accordingly, except for the priority scheme as enacted by § 64(a) which sets up certain classes of debts having priority in advance of payment of dividends to general creditors, there is no statutory predicate authorizing any departure from the principle of equality of distribution. As stated by the Circuit Court in *In re Mammoth Mart, Inc.*, 536 F.2d 950, 953 (2d Cir. 1976):

> "...[T]he theme of the Bankruptcy Act is 'equality of distribution'. If one claimant is to be preferred over others, the purpose should be clear from the statute...to give priority to a claim not clearly entitled thereto is not only inconsistent with the policy of equality of distribution; it dilutes the value of the priority for those creditors Congress intended to prefer." (Citations omitted)

The importance of maintaining the priority structure is summarized by 3A *Collier on Bankruptcy*, ¶ 64.02 [1] (14th ed. 1977) at p. 2063-2064:

> "Priority is designed to assure payment, if possible, to certain classes of claims by requiring that they be first paid before others are satisfied. Certain general unsecured claims against the estate and certain costs and expenses of the bankruptcy proceeding itself are both effected by its scope... Section 64 not only promotes the equality of treatment regardless of regional variations in the theory of priority, but it provides an important channel for congressional control of what may fairly be regarded as the primary aim of bankruptcy legistlation - an equitable distribution of the debtor's assets to his creditors." (Citations omitted).

Yet it is obvious that certain claims possess an intrinsic ethical superiority to others. For example, a particular claimant by its conduct may be the direct or indirect cause for other creditors to change their position. Similarly, a claimant may be identified with some degree of fraud, deceit or other objectionable conduct. In these type of cases, subordination of the so-called "tainted" claim is appropriate, and in fact many have argued that subordination is required in view of the Bnakruptcy Court's inherent equitable jurisdiction. *See*, § 2(a) of the former Act. A basic tenet in any bankruptcy proceeding is that fraudulent or other wrongful conduct will not prevail, and as a result the doctrine of equitable subordination has developed over the years to rectify any injustice. *See, Sampsell v. Imperial Paper Board*, 313 U.S. 215 (1941); *Pepper v. Litton*, 308 U.S. 295 (1939); *Taylor v. Standard Gas and Electric Company*, 306 U.S. 307 (1939).

The doctrine of subordination provides a means of regulating distribution of the bankrupt estate by adjusting the hierarchy of creditors' claims to equitable levels of creditors comparative positions. However, before the status of a creditor can be adjusted, either upwards or downwards, there must be a finding of wrongful conduct. *See, In re W.T. Grant Co.*, 4 B.R. 53,

74 (Bankr. S.D.N.Y. 1980). In the absence of such a showing, subordination can not be allowed. *In re Harvest Milling Co.*, 221 F. Supp. 836 (D.Ore. 1963); *In re Advance Printing & Litho Co.*, 277 F. Supp. 101 (W.D.Pa. 1967), *aff'd per curiam*, 387 F.2d 952 (3rd Cir. 1967).

Although the opinion below does not *per se* use the term "subordination", equitable considerations are clearly at work and provide the basis for the Court's ruling. Regretably, the imposition of equitable relief is done without the proper factual predicate. On two prior occasions Vintero and its president were exonerated of all charges of fraud. The Circuit Court itself affirmed this vindication but nevertheless granted CVF a general claim in bankruptcy in order to do "substantial justice".

The practical consequences of this decision are such that the Court has done "substantial justice" for CVF at the expense of the general creditor body. Elevating the CVF claim offends basic notions of bankruptcy law which prohibit a court form disturbing the priority structure within a given class of creditors. The court is without authority to erect a new subclass of general creditors even where equitable considerations prevail, absent wrongful conduct. *See, Matter of Columbia Ribbon Co.*, 117 F.2d 999 (3d Cir. 1941); *United States v. Killoren*, 119 F.2d 364 (8th Cir. 1941); *Luther v. United States*, 225 F.2d 495 (10th Cir. 1955). By analogy, we might draw upon the rationale of the Third Circuit in *Matter of Columbia Ribbon Company*, wherein Judge Maris discussed the principle that the court cannot invoke its equitable powers to establish priorities within a given class. In pertinent part, the Court stated:

> "...[T]hese equitable powers are to be exercised within the limits laid down by the Bankruptcy Act and subject to its specific provisions... The Court may not by granting a priority which it deems equitable set aside the clear congressional mandate that no such priority shall be accorded. *Pepper v. Litton*, 308 U.S. 295, 60 S. Ct. 238, 84 L.Ed. 281, which was relied on by the referee and the court below, is not to the contrary. That case holds that a court of bankruptcy under its

> equitable powers may disallow or subordinate a particular claim in bankruptcy which, because of the fraudulent nature of the claim or the bad faith or improper conduct of the claimant, ought not in equity and good conscious to be allowed or paid on a parity with other claims. It does not hold that the court may set up a sub-classification of claims within a class given equal priority by the Bankruptcy Act and fix an order of priority for the sub-classes according to its theory of equity." (Citations omitted) *Id.* at 1002.

There is something inherently unjust in allowing CVF to participate on a par with the estate's other general creditors. Subsequent creditors of Vintero justifiably relied upon the fact that CVF, by executing a non-recourse security agreement, voluntarily relinquished its general claim in bankruptcy. These legitimate expectations are extinguished by CVF's current participation in bankruptcy.

Vintero as a debtor-in-possession is duty bound to contest CVF's status as a creditor. A debtor who continues in possession of its property is clothed with the rights, powers, and duties of a trustee appointed under the Bankruptcy Act. Section 342 provides as follows:

> "When no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all in the powers of the trustee appointed under this Act, subject, however, at all times to the control of the court and to such limitations, restrictions, terms and conditions as the court may from time to time prescribe."

Because Vintero, as a debtor-in-possession stands in the shoes of a trustee, it owes a fiduciary obligation to all creditors. *See, e.g., In re Modern Office Supply, Inc.*, 28 B.R. 943, 944, (Bankr. W.D. Okla. 1983): ["The debtor-in-possession becomes a fiduciary of the estate and is subject to the court's imposition of orders and duties."]; *In re Harms*, 10 B.R. 817, 821 (Bankr. D. Co. 1981) ["Since the debtor-in-possession stands in the shoes of the trustee, he owes a fiduciary obligation to all creditors."]

As a trustee, Vintero has the power to avoid an unperfected security interest pursuant to § 70(c) of the former Act, and Vintero must exercise this power for the benefit of other creditors and not itself. Accordingly, by avoiding CVF's unperfected security interests, the entire class of general creditors are the ultimate benefactors in that the vessel becomes property of the estate subject to their claims. Vintero derives no direct pecuniary benefit except to the extent that additional assets are made available to pay creditors and equity interests.

The legal distinctions between the debtor and debtor-in-possession were apparently overlooked by the court below. This court however should not forget that the Vintero bankruptcy proceeding certainly does not involve just two parties; other creditors have filed claims in the bankruptcy proceeding and their interests are clearly prejudiced by the introduction of CVF as a fellow general creditor. The severe prejudice done to general creditors can only be rectified if the Supreme Court grants certiorari. By doing so, this court can erase a dark precedent in the law of commercial financing which if allowed to stand, will forever cause confusion and uncertainty among creditors in bankruptcy.

II.

THE CIRCUIT COURT OF APPEALS FAILED TO GIVE PROPER EFFECT TO THE MEANING OF THE NON-RECOURSE TERM

Under ordinary circumstances, CVF, as the holder of an unperfected security interest, would be entitled to assert a general claim against the debtor. However, in this particular case, the parties executed a "non-recourse" security agreement which expressly limited CVF's rights in the event of a default. Both security agreements executed with respect to the two vessels (Santa Rosa and Bonaire Star) contain the following exculpatory language:

> "Anything to the contrary notwithstanding contained in this mortgage herein referred to, the Mortgagor (Vintero) shall in no event be liable for a money judgment in the event of a default hereunder, it being

> understood that the Mortgagee (CVF) *looks to the security provided by this mortgage only* and the lien thereof not, however, to be affected in any way." (Emphasis supplied) (App. 63.)

The non-recourse character of the parties' chattel mortgage redefined traditional commercial relationships, and committed CVF to the exclusive remedy of an action against the debtor's collateral. By assenting to a non-recourse term, CVF voluntarily relinquished its ability to pursue a deficiency claim against the debtor. To put it simply, CVF either had recourse in the debtor's property, or it had no recourse at all.

Non-recourse mortgage arrangements are certainly not atypical to commercial settings. The debt or obligation secured by a chattel mortgage is contractual and the right to enforce it by legal means is dependent in the first instance on the underlying agreement. Accordingly, any limitation or restriction contained in the provisions of the instrument of obligation, or in the mortgage itself, may effect the mortgagee's rights thereunder. *Westchester Fed. S. & L. Ass'n v. Secor Lake Camp, Inc.*, 37 A.D.2d 615, 616, 323 N.Y.S.2d 514, 516 (2d Dep't 1971).

In denying CVF's right to assert a general claim against the debtor-in-possession, the Bankruptcy and District Courts were merely giving full effect to the terms and obligations of the parties' security agreement. Surely, CVF was not obligated to relinquish its contractual claim against the debtor. It chose to do so voluntarily, and therefore is bound by its agreement. *See, Stern vs. Itkin Bros., Inc.*, 87 Misc. 2d 538, 358 N.Y.S.2d 753 (Sup. Ct. N.Y. Co. 1975).

Parenthetically, it should be remembered that CVF has already taken action upon the non-recourse security agreement in its application to receive the net proceeds of sale from the auction of the Bonaire Star. These monies have been paid to CVF. Because of the non-recourse term, CVF no longer has any contractual claim against the Bonaire Star and the monies Vintero drew thereunder. The same result must necessarily be reached with respect to the Santa Rosa, since both security agreements contain the identical exculpatory clause. CVF

cannot in one breath rely upon the security agreement when it is advantageous to do so, and then in the next breath completely disregard the security agreements' plain and unambiguous terms.

The Uniform Commercial Code allows merchants a great deal of flexibility in defining the exact terms of their commercial relationships. *See, Brodheim v. Chase Manhattan Bank, N.A.*, 75 Misc.2d 285, 347 N.Y.S.2d 394, 13 UCC Rep. 139 (Sup. Ct. N.Y. Co. 1973); *Frank LeRoux, Inc. v. Burns*, 4 Wash. App 165, 480 P.2d 213, 8 UCC Rep. 818 (Wash. 1971) [Uniform Commercial Code leaves the parties free to make their remedies according to their particular needs so long as their agreement does not disclaim the obligations of good faith, diligence, reasonableness and care and is not unconscionable.]

Freedom of contract is preserved by Maryland's Uniform Commercial Code § 1-102(3)[2] which provides:

> "...(3) the effective provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act, may not be disclaimed by agreement, but the parties may, by agreement, determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."

Acknowledging the parties basic right to vary the terms of the Uniform Commercial Code, Professor Thomas Quinn states in his Treatise:

> The Uniform Commercial Code, for example, is a complex set of legal rules structuring the rights and obligations of a wide variety of contracting parties (e.g., buyers and sellers, secured parties and debtor), and it is sitting there on the books waiting when two individuals sit down to work out a deal.

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[2] Relying upon a "Last Event" analysis (App. 58), the Bankruptcy Code applied the law of Maryland to the transactions, and thus all citations are to Maryland's Uniform Commercial Code (Md. [Commercial Law] Code Ann. (1975).

> No one questions the freedom of these individuals to contract in a manner that is not contrary to the Code rules. But are they also free to change the Code rules to suit their own purposes? *To put it bluntly, are they free to devise rules for themselves that might be quite different than the Code rules?*
>
> *The answer to that question is yes. Let it be said openly and plainly less there be any doubt. What this means is that the Code opts for freedom of contract in its most radical form, permitting an alteration of its own basic rules. This is exactly what 1-102(3) says."* (emphasis supplied)

Uniform Commercial Code Commentary and Law Digest, ¶ 1-102 (a)(1)(1st ed. 1978).

Taking these comments to heart, this Court must give effect to the parties' security agreement as written. Maryland's Uniform Commercial Code § 9-201 provides in pertinent part that "except as otherwise provided by this Act, a security agreement is effective *according to its terms* between the parties against the purchasers of the collateral and against the creditors." (emphasis supplied).

In the instant case, the terms of the security agreements in question are irresistibly clear – the exculpatory language agreed to by CVF precludes it from asserting a general claim in bankruptcy. When sophisticated parties dealing at arm's length execute a "non-recourse" chattel mortgage, there is no valid reason to deny enforcement of their bargain.

CONCLUSION

This case raises substantial issues in the treatment of claims and creditors in a bankruptcy proceeding which the Supreme Court should resolve. Accordingly, the instant petition for a writ of certiorari to the Supreme Court of the United States should be granted.

Dated: New York, New York
October 11, 1984

Respectfully submitted,

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APPENDIX

APPENDIX A
ORDER DENYING PETITION FOR REHEARING

United States Court of Appeals
for the
Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of July one thousand nine hundred and eighty-four.

IN RE: VINTERO CORPORATION,

Debtor,

VINTERO CORPORATION,

Plaintiff-Appellee,

— v. —

CORPORACION VENEZOLANA DE FOMENTO,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, Vintero Corporation.

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

APPENDIX B
SECOND CIRCUIT OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 605—August Term, 1983

(Argued January 20, 1984 Decided May 29, 1984)

Docket No. 83-5048

In the Matter of

VINTERO CORPORATION,

Debtor.

VINTERO CORPORATION,

Plaintiff-Appellee,

—v.—

CORPORACION VENEZOLANA de FOMENTO,

Defendant-Appellant.

Before:

FEINBERG, *Chief Judge.*
VAN GRAAFEILAND and KEARSE, *Circuit Judges*

Appeal from an order of the United States District Court for the Southern District of New York (Sweet, J.) which dismissed Corporacion Venezolana de Fomento's appeals from two orders of the bankruptcy court, one declaring appellant's lien upon a ship of the Chapter XI debtor-in-possession null and void, and the other reducing appellant's claim against the debtor to the amount received from the lien on another ship. Vacated and remanded.

GLEN T. OXTOIN, New York, N.Y. (Healy & Baillie, New York, N.Y., on the brief), *for Defendant-Appellant*

NEAL M. ROSENBLOOM, New York, N.Y. (Finkel, Goldstein & Berzow, New York, N.Y., on the brief), *for Plaintiff-Appellee*

VAN GRAAFEILAND, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Southern District of New York (Sweet, J.) dismissing Corporacion Venezolana de Fomento's (CVF) appeals from two bankruptcy court orders. In the challenged orders, the bankruptcy court held that CVF could not base a claim against the estate of the debtor, Vintero Corp., on an unperfected security interest in a ship, the S.S. Santa Rosa, owned by Vintero, and reduced CVF's claim to the amount it received by virtue of a perfected lien on another ship.

Because three of our opinions stemming from the underlying dispute between the parties already have been published, *Vintero Corp. v. CVF*, 675 F.2d 513 (2d Cir. 1982), *CVF v. Vintero Sales Corp.*, 629 F.2d 786 (2d Cir. 1980), *aff'd after remand*, 712 F.2d 33 (2d Cir. 1983), we may quickly summarize the salient facts. In 1975, Vintero purchased two ships, the S.S. Santa Rosa and the S.S. Bahama Star, for approximately $2 million, and sold them to a related corporation (Cariven) for approximately $17 million. In return for CVF's guarantee of Cariven's financing arrangements, Vintero gave CVF a security interest in each ship. The security agreements contained a non-recourse clause, which, in case of default, limited CVF to the security provided by the ships and protected the debtor from personal liability. Vintero received payments approximating $8 million before Cariven defaulted on its financial obligations and CVF prevented further payments from being made. Pursuant to its guarantee, CVF eventually had to pay about $12 million to satisfy Cariven's obligations, most of which remains unrecovered.

On November 4, 1977, Vintero filed a petition for voluntary arrangement under Chapter XI of the Bankruptcy Act of 1898, 11 U.S.C. § 722 (1976),[1] and became a debtor-in-possession. Because of Cariven's default, Vintero properly listed the Santa Rosa and the Bahama Star among its own assets. On June 15, 1979, Vintero commenced an adversary proceeding in the bankruptcy court seeking a declaration that CVF's lien on the Santa Rosa was null and void as against Vintero, the debtor-in-pos-

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[1] The provisions of the Bankruptcy Act of 1898, rather than those of the Bankruptcy Reform Act of 1978, apply to proceedings initiated in 1977. Pub. L. No. 95-598, § 403(a). Unless otherwise indicated, all citations of the United States Code are to the 1976 version.

session, because CVF had allowed its perfected security interest in the ship to lapse. When CVF filed its financing statements, the Santa Rosa was berthed in Virginia. When the ship later was moved to Maryland, CVF failed to refile in accordance with the requirements of Maryland law. Under section 9-301(l)(b) of Maryland's Uniform Commercial Code, CVF's unperfected security interest therefore became subordinate to the rights of "a person who becomes a lien creditor without knowledge of the security interest and before it is perfected."

The bankruptcy court held that Vintero, as debtor-in-possession, had the status of such a creditor and granted Vintero summary judgment. *See* 11 U.S.C. § 110c. The district court affirmed. Both courts appear to have adopted Vintero's argument that CVF lost its rights as a secured creditor upon the initiation of Vintero's Chapter XI proceedings and that the non-recourse agreement precluded CVF from asserting any claim as a general creditor against Vintero. The issue before us on this appeal, therefore, is whether the combined effect of the filing lapse and the non-recourse clause precluded CVF from making any claim whatever in the estate of the Chapter XI debtor based on CVF's security interest in the Santa Rosa. We conclude that it did not.

When Vintero assumed the status of a debtor-in-possession, it became vested with the rights and powers of a trustee. *Gardner-Denver Co. v. C.J. Haslam, Inc.*, 325 F.2d 208, 209 (2d Cir. 1963). Accordingly, with respect to CVF's lien, Vintero had all the rights that an ideal judicial lien creditor would have as of the filing of Vintero's petition. *See Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603, 605-07 (1961). This included the right to move on behalf of Vintero's creditors to invalidate the preference of CVF's secured transaction, so that,

insofar as the relationship among the claiming creditors was concerned, CVF assumed the status of an unsecured creditor. *In re Martin Custom Made Tires Corp.*, 108 F.2d 172, 173 (2d Cir. 1939); *In re J.R. Cianchette & Sons Corp.*, 198 F. Supp. 740, 742 (D. Me. 1961).

However, although Vintero, as a debtor-in-possession, could exercise the rights of a lien creditor, it obviously was not one. *See New York-Brooklyn Fuel Corp. v. Fuller*, 11 F.2d 802, 804 (2d Cir. 1926). Filing requirements are for the benefit of third parties, not the debtor. U.C.C. § 9-301. "The security interest need not be perfected to be enforceable against the debtor; perfection is important only insofar as adverse third parties have entered the picture." Clark, *The Law of Secured Transactions Under the Uniform Commercial Code* ¶ 3.2[2], at 3-8 (1980). *See Aeroglide Corp. v. Zeh*, 301 F.2d 420, 421 (2d Cir.), *cert. denied*, 371 U.S. 822 (1962); *Lockhart v. Garden City Bank & Trust Co.*, 116 F.2d 658, 661 (2d Cir. 1940); *In re White Plains Ice Service, Inc.*, 109 F.2d 913, 914 (2d Cir. 1940). Vintero was given the right to avoid CVF's security interest in order to protect such third parties, not to create a windfall for Vintero itself. *See Whiteford Plastics Co. v. Chase Nat'l Bank*, 179 F.2d 582, 584 (2d Cir. 1950). Vintero suffered no prejudice because of the lapse in filing, and we see no reason why it should benefit from such lapse. *See In re Fried Furniture Corp.*, 293 F. Supp. 92, 93 (E.D.N.Y. 1968), *aff'd*, 407 F.2d 360 (2d Cir. 1969)(per curiam). To the extent that other creditors of Vintero are not affected adversely by enforcement of CVF's security interest, there is no reason why such interest should not be enforced. *Whiteford Plastics Co. v. Chase Nat'l Bank*, *supra*, 179 F.2d at 584.

A non-recourse clause normally is intended to reduce the risks to the party granting the security interest if the

secured party is later forced to foreclose on the security. *See United States v. Stirling*, 571 F.2d 708, 715 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978). By precluding the secured party from getting a deficiency judgment against him, the debtor contains the risk of loss to the security alone; any other assets of the debtor will be preserved from the secured party's later attempt to recover. If such a concern remains relevant after a debtor has declared bankruptcy, the non-recourse clause can perform its intended function if the secured party's claim against the bankrupt is limited to the proceeds of the security.

A bankruptcy court has broad equitable powers which may be invoked to see "that substance will not give way to form, that technical considerations will not prevent substantial justice from being done." *Pepper v. Litton*, 308 U.S. 295, 304-05 (1939). Counsel for Vintero conceded at oral argument that the Santa Rosa may be worth as much as $10 million. If the value of the Santa Rosa were not included as part of Vintero's plan of arrangement so as not to be intended for the benefit of Vintero's creditors, there would be no reason in law or equity for CVF to lose the benefit of its lien. *Whiteford Plastics Co. v. Chase Nat'l Bank*, *supra*, 179 F.2d at 584. If, as is more likely, the ship has to be sold in order to satisfy the claims of Vintero's creditors, the debtor, of course, must be able to convey a title unencumbered by CVF's lien. *See In re Dennis Mitchell Indus., Inc.*, 419 F.2d 349, 359-60 (3d Cir. 1969). However, substantial justice and U.C.C. § 9-306 suggest that, as between CVF and Vintero, CVF's claim against the identifiable proceeds of the sale properly may be termed a security interest, *see Forde v. Kee Lox Mfg. Co.*, 437 F. Supp. 631, 634 (W.D.N.Y. 1977), *aff'd*, 584 F.2d 4 (2d Cir. 1978), satisfaction of which would not violate the non-recourse clause. On the other

hand, substantial justice and established law mandate that, despite its security interest, CVF shall not be entitled to priority of payment over other creditors but must share alike with them. *See Stowers v. Mahon*, 483 F.2d 557, 560 (5th Cir. 1973), *rev'd on other grounds*, 416 U.S. 100 (1974)(per curiam); *In re Martin Custom Made Tires Corp.*, *supra*, 108 F.2d at 173; *In re B.W. Scott Book & Art Store, Inc.*, 12 F. Supp. 18, 19 (W.D.N.Y. 1935); 4B *Collier on Bankruptcy* 14th ed. ¶ 70.52[2].

On the assumption that the Santa Rosa will be sold as part of Vintero's plan of arrangement, we hold that CVF's security interest shall attach to the identifiable proceeds of the sale, but that such security interest shall not entitle CVF to a priority of payment as against Vintero's general unsecured creditors. Such disposition will protect the interests of Vintero's creditors, will recognize the merit of CVF's substantial claim, and will preclude the possibility of Vintero reaping an undeserved windfall.

We vacate the order of the district court with instructions to remand to the bankruptcy court for further proceedings consistent with this opinion.

APPENDIX C
DECISION OF SOUTHERN DISTRICT [JUDGE SWEET]

United States District Court
Southern District of New York

In the Matter of
VINTERO CORPORATION,

Debtor.

CORPORACION VENEZOLANA DE FOMENTO,

Plaintiff-Appellant,

– against –

VINTERO CORPORATION,

Defendant-Appellee.

APPEARANCES:

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SWEET, D.J.

Once again the events in Venezuela in the period of 1972-1975 and in the courts in this District are before the court arising out of the acts of Vincent A. DeLyra, a United States citizen ("DeLyra"), Federico Gascue Rios ("Gascue"), Venezolana de Cruceros del Caribe, C.A. ("Carvien"), Vintero Sales Corp. and Vintero Corp., the bankrupt, ("Vintero"), and Corporacion Venezolana de Fomento, a Venezuelan agency ("CVF"). This time CVF has appealed from two orders of the Honorable Joel Lewittes, Bankruptcy Judge. The first, dated July 8, 1980, denied CVF's application to remove the vessel SANTO ROSA from the estate in bankruptcy of Vintero because Judge Lewittes found that under the Uniform Commercial Code ("U.C.C."), CVF's security interest was unperfected and subordinated to Vintero's status as a debtor-in-possession. The second, dated December 18, 1981, reduced CVF's bankruptcy claim to such sums as represents the net proceeds of the sale of the BONAIRE STAR after payment of maritime lien claims. For the reasons set forth below, the orders of the Bankruptcy Court will be affirmed, and the appeals dismissed.

The procedural history is complex, and the roughly $12 million loss sustained by CVF substantial. Its failure to obtain relief has stemmed from its difficulties of proof, the nature and participation of the parties from whom it has sought damages, and its failure to protect itself adequately as this complicated underlying transaction moved from concept to execution, and then to frustration, and ultimately to the bankruptcy of at least one of the parties. This history has been spelled out in prior opinions in this and related actions, *see Corporacion Venezolana de Fomento*, No. 76 Civ. 1671 (S.D.N.Y. Dec. 22, 1982), *aff'd*, No. 83-7082 (2d Cir. July 8, 1983 (per curium)); *Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513 (2d Cir. 1982); *Corporacion Venezolana de Fomento v. Vintero Sales*, 477 F. Supp. 615 (S.D.N.Y. 1979), *aff'd in part, rev'd in part*, 629 F.2d 786 (2d Cir.), *cert. denied*, 449 U.S. 1080 (1980); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, No. 76 Civ. 1671 (S.D.N.Y. Feb. 13, 1979), *aff'd in part and rev'd*

in part on other grounds, 629 F.2d 786 (2d Cir.), *cert. denied*, 449 U.S. 1080 (1980); *Corporacion Venezolana de Fomento v. Vintero*, 452 F. Supp. 1108 (S.D.N.Y. 1978), *remanded*, 607 F.2d 994 (2d Cir. 1979), and familiarity with these is assumed.

PRIOR PROCEEDINGS

On November 4, 1977, Vintero filed a petition pursuant to Chapter XI, Section 322 of the Bankruptcy Act of 1898, 11 U.S.C. § 722, and was continued in possession of its property. Among its assets were two undocumented maritime vessels known as the SANTA ROSA and the BONAIRE STAR. On June 15, 1979, Vintero commenced an adversary proceeding in Bankruptcy Court against CVF and Cariven, seeking judgment declaring that the alleged liens asserted by the defendants upon the SANTA ROSA were null and void as against Vintero as debtor-in-possession under the Bankruptcy Act. Thereafter, Vintero moved for summary judgment seeking to extinguish CVF's claims. The motion was denied initially on the ground that CVF raised a material issue of fact as to whether Vintero owned the vessel at the time its Chapter XI Petition was filed. Discovery was conducted, the motion was renewed and ultimately granted.

By decision dated June 20, 1980, the Bankruptcy Court found that there was no genuine and material issue of fact as to whether or not Vintero owns the SANTA ROSA. Judge Lewittes granted Vintero summary judgment on the second count of the complaint in the adversary proceeding on the ground that CVF should have filed a financing statement in Maryland within four months after the vessel was moved to that state in order to continue perfection of CVF's security interest pursuant to U.C.C. § 9-103(3). Judge Lewittes concluded that U.C.C. § 9-103(2) did not apply because the SANTA ROSA was inventory for sale and neither equipment nor inventory for lease.

Judge Lewittes confirmed that under the provisions of Section 342 of the Bankruptcy Act, 11 U.S.C. § 742, the debtor-in-possession has the powers of a trustee under Section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c), which gives the trustee the status of a creditor holding a lien upon all of the

assets of the debtor as of the time the Chapter XI petition was filed. He reviewed the interplay between Section 70(c) of the Bankruptcy Act and Sections 9-301 and 9-401 of the U.C.C., and found that the holder of an unperfected security interest is subordinate and inferior to the interests of a trustee including a debtor-in-possession, and considered the agency argument raised by CVF, and rejected its application. A judgment was signed by the Bankruptcy Court on July 8, 1980, and CVF filed a notice of appeal on July 17, 1980.

On appeal, the Honorable Lawrence W. Pierce, then on the District Court, affirmed the Bankruptcy Court and refused to consider the equitable arguments raised on appeal by CVF which had not been raised in the bankruptcy proceedings. The Court of Appeals reversed Judge Pierce's decision and remanded the appeal for consideration of CVF's equitable arguments. *Vintero Corporation v. Corporacion Venezolana de Fomento*, 675 F.2d 513 (2d Cir. 1982). On remand, the appeal was transferred to this court in connection with related matters pending before it.

In 1976, after blocking any further payments to the DeLyra interests, CVF commenced a plenary action in this District for a declaratory judgment that its guaranty of Cariven's debt was void by reason of fraud and failure to obtain requisite Venezuelan Government approvals. Vintero, its predecessor, Vintero Sales Corp., the Merban Corp., Cariven's underwriter, ("Merban") and DeLyra, among others, were named as defendants. The participating banks, Cariven's lenders, intervened and counterclaimed against CVF. The Honorable William C. Conner granted summary judgment to the intervening banks and set for trial the issues involving Merban and the DeLyra interests. *Corporacion Venezolana de Fomento v. Vintero*, 452 F. Supp. 1108 (S.D.N.Y. 1978). After transfer of the case to this court, I concluded after a bench trial on those issues left that neither the DeLyra interests nor Merban committed actionable fraud, and rejected CVF's non-approval defense. *Corporation Venezolana de Fomento v. Vintero Sales Corp.*, No. 76 Civ. 1671 (S.D.N.Y. Feb. 13, 1979).

On July 28, 1980, the Court of Appeals affirmed the lower court in part, reversed in part and remanded for trial of the fraud claims against Vintero and DeLyra under Venezuelan law. *Corporacion Venezolana de Fomento v. Vintero Sales*, 629 F.2d 786 (2d Cir. 1981). On remand, evidence was received as to Venezuelan law, and I concluded CVF did not prove fraud on the part of Vintero. *Corporacion Venezolana de Fomento*, No. 76 Civ. 1071, slip op. at 14 (S.D.N.Y. Dec. 23, 1982). As to DeLyra, I declined to determine his liability to CVF on the basis of international comity. *Id.* at 15. The decision on remand was affirmed by the Second Circuit. *Corporacion Venezolana de Fomento*, No. 83-7082 (2d Cir. July 8, 1983) (per curium).

In the Bankruptcy Court, CVF had obtained about $230,000 of the sale proceeds of the BAHAMA STAR, after settling with maritime lien claimants, based upon CVF's U.C.C. perfected security interest in that vessel. Vintero then moved to reduce CVF's $12 million claim in the bankruptcy to only that amount received from the sale of the BAHAMA STAR on the theory that the non-recourse language in CVF's U.C.C. security agreement on the SANTA ROSA (the perfection of which had admittedly lapsed) had extinguished CVF's residual claim to the SANTA ROSA as an unsecured creditor of Vintero. After a hearing on November 19, 1981, and a rehearing (requested by CVF) on December 17, 1981, the Bankruptcy Court granted Vintero's motion by an order entered December 18, 1981. CVF filed a notice of appeal on December 28, 1981.

THE FACTS

The underlying facts of the transactions which gave rise to this dispute have been found, and more than once. Only the particular facts of significance to these appeals will be repeated here.

On December 2, 1974, Vintero and Cariven entered into a document under which Vintero agreed to purchase two vessels "for the account of Cariven" and complete certain repairs to the vessels in stages (the "Resale Contract"). Payment by Cariven was to be made by means of letters of credit ("L/C"): one for each vessel based upon the CVF Guaranty in the amount of $5,814,000 and a second (for each vessel) provided by the

stockholders of Cariven in the amount of $3,186,000.

In the preparatory transactions, Vintero purchased the vessels at a combined cost of $2,204.746 (SANTA ROSA for $1,004,746 and BAHAMA STAR for $1,200,000), and in turn contracted to transfer them to Cariven for a total of 75 million Bs., or $17,441,860. Having contracted for the first ship, SANTA ROSA, from the U.S. Maritime Administration in April, 1975, Vintero paid for it with a May 16, 1975 unsecured Merban "bridge" loan of $904,271 and other borrowing.

Some 60% of the "resale" price of 75 million Bs. was made available by the L/C's opened by Merban with Security Pacific International Bank in favor of Vintero, each in the amount of $5,250,000. The third of the $17,441,860 "cost" of the ships, representing Cariven's unpaid equity capital, set forth an "acceptable arrangement." The $10,500,000 of CVF-guaranteed loan agreement funds was made available by Merban on L/C conditions identical to those recited in the Resale Contract.

The only L/C document required for drawing out the first 50% (a total of $5,250,000 for the two ships), was Merban's own statement that it had received a "duly recorded first mortgage" on the ships in favor of CVF. Merban issued its statement based upon the minimal security provided by a U.C.C. security interest filed only at the location of the respective vessel. The Vintero $8,895,397.62 invoice of December 20, 1974, certified by DeLyra and countersigned by Gascue, was submitted to commence the flow of funds to Vintero.

On or about May, 1975, Vintero entered into a security agreement with CVF granting to CVF a security interest in and to the SANTA ROSA. The security agreement, *inter alia*, states that the SANTA ROSA is an undocumented vessel, that the debtor is a New York corporation and that the debtor is not a resident of the State of Virginia. The security agreement further sets forth that Vintero does not maintain a place of business in Virginia and grants to the mortgagee all of the rights and remedies of a secured party under the U.C.C. Thereafter, on or about May 19, 1975, a financing statement was filed with the State Corporation Commission at Richmond, Virginia, the

State where the vessel was berthed, designating CVF as the secured party.

When Vintero purchased the SANTA ROSA from the U.S. Maritime Administration, it was located on the James River in Virginia. While CVF filed a financing statement with the State Corporation commission at Richmond, Virginia, financing statements were not filed either in the State of New York or Maryland.

From September 1975 through September 12, 1978, the SANTA ROSA was located at the Maryland Ship Building and Dry Dock Company in Baltimore, Maryland. Beginning on November 13, 1975 and continuing through April 5, 1976, a strike took place at the Maryland Ship Building and Dry Dock Company. The strike had the effect of terminating the renovation work upon the SANTA ROSA which was in progress at the time of the strike. Cariven was obligated to cause the letter of credit to be extended for the time lost plus an additional thirty days. Cariven did not extend the letter of credit.

During the trial on the fraud issues, evidence was introduced to show that Vintero spent approximately $1,100,000 more than the monies it drew down under the CVF-guaranteed letters of credit in connection with maintaining, repairing and refurbishing the ships. Vintero claims additional expenditures were made subsequent to the period reflected within the recapitulation and which Vintero continues to make.

DISCUSSION

In connection with its equitable arguments, CVF continues to assert a fraudulent scheme on the part of Vintero, and seeks to relitigate some of the events surrounding the execution of the CVF loan guarantees. Those issues, however, have already been litigated, and are entitled to full collateral estoppel effect. Indeed, the Second Circuit stated:

> In the interests of sound judicial administration, we suggest that the district court await the decision in the still-pending fraud case, *see* note 1 *supra*, which would then arguably be entitled to collateral-estoppel effect, *see Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91

> S.CT. 1434, 28 L.Ed. 2d 788 (1971), a matter which, however, we do not now adjudicate.

Vintero Corp. v. Corporacion Venezolana de Fomento, 675 F.2d 513, 516 (2d Cir. 1982). And in its recent affirmance of this court's fraud determinations, our Court of Appeals stated:

> Judge Sweet found that CVF had failed to identify who was behind the various supposedly fraudulent acts, to show that those acts caused CVF to take steps which led to its losses upon the loan guarantee, or to prove an unjustified inflation of the price of the ships... We have reviewed the various claims made on appeal and we conclude that Judge Sweet's findings preclude recovery by CVF against any defendant based on the Venezuelan Law of Obligations, the Venezuelan penal code, the Venezuelan law of vicarious liability, or CVF's position as a subrogee. CVF's claim under the Venezuelan law of simulation fails in light of Judge Sweet's finding that the cost of repairs was greater than the amount drawn down under the letters of credit. Plaintiff attacks that finding as not supported by the record, but it was in fact based on the Vintero "Recapitulation". While that document may have self-evident weakensses, CVF had ample opportunity in discovery and at trial to undermine its contents. Instead, it offered it as an exhibit. We see no reason to upset a finding of fact based upon it... CVF has had a full and fair opportunity to litigate this protracted matter and has chosen for reasons known best to it not to present what would seem to be the most cogent evidence available. It is not entitled to a further opportunity to supply that which it has thus far declined to offer.

Corporacion Venezolana de Fomento v. Vintero Sales Corp., No. 83-7083 (2d Cir. July 8, 1983) (per curium).

CVF has twice failed to prove actionable fraud against Vintero. Because the doctrine of constructive trust is by design primarily "fraud rectifying," it would be difficult under the

circumstances of this case to require Vintero to disgorge a vessel which it rightfully retains based on what CVF continues to call a fraudulent scheme. *See e.g., In re Wells' Will*, 36 A.D. 2d 471, 474, 321 NYS2d 200, 205 (4th Dep't 1971), *aff'd*, 29 N.Y.2d 931, 329 N.Y.S.2d 322 (1972) ("A constructive trust is a 'fraud rectifying' trust rather than 'intent enforcing' trust'); *Wirth v. Wirth*, 38 A.D.2d 611, 326 N.Y.S.2d 308, 311 (3rd Dep't 1971) ("A constructive trust is a vehicle for 'fraud rectifying'"). The fact that Vintero, by virtue of its status as a debtor-in-possession, was able to vitiate the CVF lien based upon CVF's failure to reperfect its security interest does not give rise to the imposition of a constructive trust. CVF has cited no authority for the proposition that where a creditor fails to reperfect a security interest, a constructive trust should be imposed in the absence of fraud in order to avoid the consequences of imperfection.

CVF nevertheless argues that the equitable fiction of a constructive trust may be imposed in the absence of actual fraud so long as "unjust enrichment" is present. Its claim is that DeLyra was unjustly enriched in the transaction in question by about $5 million plus the SANTA ROSA. However, Vintero's assets are before the court on this appeal, DeLyra's are not. The record fails to establish that Vintero, the bankrupt, has been unjustly enriched. As indicated above, Vintero spent over $1,000,000, and CVF has not demonstrated who or what entity possesses the monies it now claims as its own.

Moreover, although the Chapter IX estate eventually benefits from a debtor's avoidance powers, this "enrichment" is not "unjust." The estate's gain, if any, can be directly attributed to CVF's failure to comply with the provisions of the U.C.C. Had CVF properly reperfected its security interest in accordance with U.C.C. § 9-103(3), or been able to set aside the entire transaction as fraudulent, there would be little doubt as to CVF's security interest in and to the collateral.

Indeed, with respect to the BONAIRE STAR, CVF was entitled to the proceeds of sale after satisfaction of various maritime liens since it retained a vailidity perfected security interest in that vessel. The same result would have been obtained with

respect to the SANTA ROSA, had CVF taken appropriate action once the vessel left Virginia.

Further, courts have been reluctant to resurrect a "dead lien" by the doctrine of constructive trust. *See Beverly Hills National Bank & Trust Co. v. Compania De Navegacione Almirante*, 437 F.2d 301 (9th Cir.), *cert. denied*, 402 U.S. 996 (1971); *Cherno v. Dutch American Mercantile Corporation*, 353 F.2d 147 (2d Cir. 1965); *Donald W. Bower, Inc. v. Frank*, 219 F.2d 509 (D.C.Cir. 1955); *In re Penn-Dixie Steel Corp.*, 6 B.R. 817 (B.C. S.D.N.Y. 1980), *aff'd*, 10 B.R. 878 (S.D.N.Y. 1981); *In re Dean and Jean Fashions, Inc.*, 329 F. Supp. 663 (W.D.Okl. 1971); *Empire Stevedoring Co., Ltd. v. Oceanic Adjusters, Ltd.*, 315 F. Supp. 921 (S.D.N.Y. 1970).

CVF further argues that a clause should be implied in law, or quasi contract, in the Resale Contract to the effect that because Cariven had "paid more than the reasonable value of the vessels... title to the vessel shall be deemed to be in Cariven." The implication of such a quasi contractual clause would, of course, result in Cariven's having title to the SANTA ROSA before Vintero's Chapter XI petition was filed. CVF seeks this result, of course, in order to obtain recovery on the $12 million allegedly owed to it by Cariven.

The law will not impose a quasi-contractual obligation in favor of a party in default under an express contract. *Vintero v. Corporacion Venezolana de Fomento, supra*, 675 F.2d at 515 (2d Cir. 1982). CVF did not dispute that Cariven breached its contractual obligations to Vintero in the Bankruptcy Court proceedings, and as such, Judge Lewittes states that "no issue of fact has been raised by Cariven or CVF requiring a trial with respect to Cariven's breach." There is no reason to disturb this finding on appeal, since a party who has not raised an issue below "is precluded from raising it for the first time on appeal." *Schwimmer v. Sony Corp. of America*, 637 F.2d 41, 49 (2d Cir. 1980).

Even if I were to consider CVF's argument on the merits, it fails. CVF claims that Cariven was not in breach. As Judge Lewittes pointed out, "a reading of the contract, as a whole,

unambiguously reveals an agreement between Cariven and Vintero that the letter would purchase the S.S. SANTA ROSA, *inter alia*, for the former, renovate the ship and deliver it to Cariven in Venezuela *provided* that Cariven fulfilled its obligations under the contract." In accordance with the terms of the Resale Contract, Cariven was also obligated to extend the L/C for the time lost during the strike beginning on November 13, 1975, at the Maryland Ship Building and Dry Dock Company plus an additional thirty days. It is undisputed that the L/Cs were not extended, and Cariven's failure to extend them constituted a material breach.[1]

Finally, the doctrine of quasi contract, like that of constructive trust, requires a showing of unjust enrichment. *See generally*, 12 *Williston on Contracts* § 1454 (Third Ed., 1970). As indicated above, CVF has failed to demonstrate that Vintero was unjustly enriched.

With respect to the second order of the Bankruptcy Court dated December 18, 1981, reducing CVF's claim to such sum as represents the net proceeds of the sale of the BONAIRE STAR after payment of all maritime lien claims, CVF argues that the Bankruptcy Court erred in construing the non-recourse clause in the security agreement to limit CVF to a claim under only a perfected security interest, and incorrectly concluded that when CVF failed to refile after Vintero moved the SANTA ROSA, CVF's claim became unperfected and no longer came within the non-recourse clause.

Ordinarily, CVF, as the holder of an unperfected security interest, would be entitled to assert a general claim against the debtor. However, in this particular case, the parties exectued a "non-recourse" security agreement limiting CVF's rights in

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[1] CVF also argues that Vintero materially breached the Resale Contract by "passing off a U.C.C. security interest as a first ship mortgage," the latter allegedly reqired as a condition for satisfying the drawing down of the first 50% of the L/C proceeds. CVF has not demonstrated that the L/C contemplated a "ship" mortgage, and there is no reason to disturb the Bankruptcy Court's interpretation of the relevant provision of the L/C as requiring that Vintero file the mortgage which it undisputedly did.

the event of a default. Both security agreements executed with respect to the two vessels contain the following exculpatory language:

> Anything to the contrary notwithstanding contained in this mortgage herein referred to, mortgagor (Vintero) shall in no event be liable for a money judgment in the event of a default hereunder, it being understood that the mortgagee (CVF) *looks to the security provided by this mortgage only* and the lien thereof, not however, to be effected in any way. (emphasis supplied).

In denying CVF's right to assert a general claim against the debtor-in-possession, the Bankruptcy Court was merely giving full effect to the terms of the parties security agreement. CVF was not obligated to relinquish its contractual claim against the debtor. It chose to do so voluntarily, and therefore is bound by its agreement. *See, Stern v. Itkin Bros.*, 87 Misc.2d 538, 385 N.Y.S.2d 753 (Sup.Ct.N.Y.Co. 1975).

CVF relied upon the security agreement in its application to receive the net proceeds of the sale of the BONAIRE STAR. Those monies have been paid to CVF. CVF under the agreement now no longer has any claim with respect to the BONAIRE STAR and monies Vintero drew thereunder.

The UCC allows merchants a great deal of flexibility in defining the exact terms of their commercial relationships. *See Brodheim v. Chase Manhattan Bank, N.A.*, 75 Misc.2d 285, 347 N.Y.S.2d 394 (Sup.Ct. N.Y.Co. 1973); *Frank LeRoux, Inc. v. Burns*, 480 P.2d 213, 4 Wash.App. 165 (Wash 1971) (The Uniform Commercial Code leaves the parties free to make their remedies according to their particular needs so long as their agreement does not disclaim the obligations of good faith, diligence, reasonableness and care and is not unconscionable). Freedom of contract is preserved by U.C.C. § 1-102(3) which provides:

> (3) *The effective provisions of this Act may be varied by agreement, except as otherwise provided in this Act* and except that the obligations of good faith,

> diligence, reasonableness and care prescribed by this act, may not be disclaimed by agreement, but the parties may, by agreement, determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable. (emphasis supplied)

The non-recourse term of the security agreement is clear: the exculpatory language agreed to by CVF precludes CVF from asserting a general claim in bankruptcy. When sophisticated parties dealing at arms length execute a "non-recourse" chattel mortgage, there is no valid reason to deny enforcement of their bargain. Accordingly, the Bankruptcy Court's order expunging CVF's general claim should be affirmed as it merely gives full effect to the express terms of the parties' security agreement.

For the reasons set forth above, the Bankruptcy Judge is affirmed and both appeals are dismissed. The clerk is directed to enter judgment dismissing the appeals.

IT IS SO ORDERED.

DATED: New York, N.Y.
July , 1983

ROBERT W. SWEET
U.S.D.J.

APPENDIX D
ORDER REDUCING CLAIM

United States District Court
Southern District of New York

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In the Matter

-of-

VINTERO CORPORATION,

Debtor.

No. 77 B 2687

ORDER REDUCING CLAIM

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Upon reading and filing the debtor's notice of motion dated November 2, 1981 seeking an order reducing the claims filed by Corporacion Venezolana de Fomento (hereinafter referred to as "CVF") in the sum of $12,093,261 to such sum as represents the net proceeds of the sale of the SS Bonaire Star after the payment of all maritime lien claims which have priority over the security interest of CVF; and upon the affidavit of Dorothy Brent, sworn to on November 2, 1981 showing service of the motion papers upon the respondent named therein; and upon the affidavit of Glen G. Oxton, sworn to on November 16, 1981 said affidavit being styled as a second supplemental and reply affidavit in support of CVF's motion for summary judgment; and said motion having come on to be heard before the undersigned bankruptcy judge on November 19, 1981; and after hearing Finkel, Goldstein & Berzow, attorneys for the debtor by Neal M. Rosenbloom, Esq., of counsel in support of the motion; and after hearing Healy & Baillie, attorneys for CVF by Glen T. Oxton, Esq., of counsel, in opposition to the motion; and upon the record compiled at said hearing, it is

ORDERED, that the debtor's motion be and hereby is in all respects granted; and it is further

ORDERED, that the claim of CVF in the sum of $12,093,261 be and hereby is reduced to said sum as represents the net proceeds of the sale of the SS Bonaire Star after payment of all

maritime lien claims which priority over the security interest of CVF; and it is further

ORDERED, that the balance of CVF's claim be and hereby is expunged, and it is further

ORDERED, that CVF or the debtor be and hereby is authorized and empowered to begin such proceedings before this Court as are necessary to determine and fix the amount of the maritime liens and claims asserted against the debtor, as such liens and claims pertain to the SS Bonaire Star; and it is further

ORDERED, that to the extent that CVF compromises any lien claim asserted against the debtor, each and every claimant which so agrees to reduce its maritime lien claim against the debtor shall deliver to the debtor a release and shall consent to the entry of an order expunging its claim or reducing its claim against the debtor by the full amount of the lien as that lien pertains to the SS Bonair Star; and it is further

ORDERED, that after the payment of all approved maritime liens and claims, the debtor be and hereby is authorizerd and empowered to pay the balance of the monies then on deposit from the sale of the SS Bonaire Star to CVF.

Dated: New York, New York
November 30, 1981

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BANKRUPTCY JUDGE

APPENDIX E
NOTICE OF MOTION TO REDUCE CLAIM

United States District Court
Southern District of New York

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In the Matter
-of-
VINTERO CORPORATION,
Debtor.

No. 77 B 2687
NOTICE OF MOTION
TO REDUCE CLAIM

----------X

SIRS:

PLEASE TAKE NOTICE that the officers of the undersigned will move this court at the courthouse located at Foley Square, New York, New York, Room 201, on the 19th day of November, 1981 at 11:00 A.M., or as soon thereafter as counsel can be heard for an order reducing the claim filed by Corporacion Venezolana de Fomento (hereinafter referred to as "CVF") in the sum of $12,093,261 to such sum as represents the net proceeds of sale of the SS Bonair Star after the payment of all maritime liens and claims which have priority over the security interest of CVF.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, are to be served and filed no later than three (3) days prior to the return date hereof.

Dated: New York, New York
November 2, 1981

Yours, etc.,

FINKEL, GOLDSTEIN & BERZOW
Attorneys for Debtor
67 Wall Street - Suite 1810
New York, New York 10005
(212) 344-2929

To:

HEALY & BAILLIE
29 Broadway
New York, NY

United States District Court
Southern District of New York

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In the Matter — No. 77 B 2687

-of- — APPLICATION

VINTERO CORPORATION,

Debtor.

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TO THE HONORABLE JOEL LEWITTES, BANKRUPTCY JUDGE:

The application of Vintero Corporation respectfully alleges and shows this court as follows:

1. That heretofore and on November 4, 1977, the debtor filed a petition pursuant to Chapter 11 of the Bankruptcy Act and was thereafter continued in possession if its property.

2. At or about October 14, 1981, CVF filed a proof of claim in the sum of $12,093,261 with this Court.

3. At the time the Chapter 11 petition was filed, the debtor owned two ocean going vessels known as the SS Santa Rosa and the SS Bonair Star.

4. Pursuant to an order signed by this Court, the SS Bonair Star was sold by the District Court in Mobile, Alabama sitting as an Admiralty Court.

5. Thereafter, the net proceeds of the sale after the payment of the expenses of sale were paid to Finkel, Goldstein & Berzow, as attorneys for the debtor. Pursuant to an order of this Court, the net proceeds of sale were deposited into short term certificates of deposit at Citibank, 55 Wall Street, New York, New York.

PRIOR PROCEEDINGS

6. CVF has consistently claimed that it is a secured creditor of the debt by virtue of two chattel mortgages executed by the debtor and as a result of certain UCC financing statement filings which allegedly perfected CVF's claims as a secured creditor. A copy of the chattel mortgage which pertains to the SS Bonair Star is annexed to CVF's proof of claim as Exhibit B and a copy of CVF's chattel mortgage which relates to the SS Santa Rosa is annexed to CVF's proof of claim as Exhibit C.

7. On June 15, 1981, the debtor brought on an adversary proceeding seeking judgment that CVF's security interest was null and void. After protracted proceedings before this Court, the debtor brought on a motion for summary judgment which was granted by the Court. Thereafter, a judgment was duly signed by this Court on July 8, 1980. The opinion of this Court and the underlying judgment was affirmed on appeal by the U.S. District Court.

8. A similar adversary proceeding was commenced by the debtor on November 6, 1979, seeking judgment declaring that the lien asserted by CVF against the SS Sant Rosa is subordinate and inferior to the interests of the debtor in possession. The basis for the Court's decision with respect to the SS Santa Rosa was that financing statements were improperly filed and that CVF as the holder of an unperfected security interest had rights which were subordinate and inferior to a trustee or debtor in possession.

9. CVF has brought on a motion for summary judgment in the adversary proceeding pertaining to the SS Bonair Star. The motion seeks to have the net proceeds of sale paid to CVF as the holder of a Uniform Commercial code security interest. The motion is dated October 2, 1981.

10. After receiving the motion papers, applicant's counsel advised counsel for CVF that two injured seamen have asserted maritime lien claims against the proceeds realized from the sale of the vessel. Thereafter, upon information and belief, counsel for CVF contacted counsel for the injured seamen and submitted a "supplemental and reply affidavit" sworn to on October

14, 1981 seeking to settle the maritime lien claims as part of CVF's motion for summary judgment. For the Court's reference, a copy of the supplemental and reply affidavit is annexed hereto and made a part hereof. Applicant has been advised by counsel that maritime lien claims would take priority over the claim held by a secured creditor under the provisions of the Uniform Commercial Code.

11. Applicant's attorneys have advised counsel for CVF that Applicant shall, in the near future, review all other maritime claims that pertain to the SS Bonaire Star and advise CVF of all maritime claims so that those claims can be paid prior to the time that the net proceeds of the auction sale are remitted to CVF.

THE "SECURED CLAIMS"

12. Both chattel mortgages which are annexed to CVF's proof of claim provide in applicable part, as follows:

> "Anything to the contrary notwithstanding contained in this mortgage herein referred to, Mortgagor shall in no event be liable for a money judgment in the event of a default hereunder, it being understood that the Mortgagee looks to the security provided by this mortgage only and the lien thereof, not however, to be affected in any way."

13. The above referred to clause is commonly known as an "exculpatory clause" and the clause shows that CVF has bargained to look only to its collateral in asserting claims against Vintero Corp. The motion for Summary Judgment dated October 2, 1981 seeks to enforce CVF's rights under the Bonair Star "security agreement" to have the net proceeds of the sale of the Bonair Star turned over to CVF. The debtor has not opposed the motion and only seeks to have creditors who have claims superior to CVF paid in accordance with the priorities established by law. *Clearly, CVF's deficiency claim is vitiated under the security instrument which CVF relies upon in its motion for summary judgment.* Accordingly, CVF's claim should be reduced by the balance of the monies which were advanced to Vintero in accordance with the letter of credit established with the Security Pacific International Bank.

14. Similarly, with respect to the SS Santa Rosa, the debtor has previously referred to an adversary prodceeding which was commenced on June 15, 1979 to have CVF's lien declared null and void as against the debtor in possession. On July 9, 1980, after a fiercely contested motion for summary judgment, this Court granted the relief requested by the debtor. The exculpatory clause referred to above is likewise contained within the chattel mortgage relied upon by CVF (see Exhibit C to CVF proof of claim). Once again, CVF negotiateed, accepted and never questioned the non-recourse chattel mortgage until proceedings were commenced in this Court to enforce the rights of the parties. Had CVF properly filed financing statement, its interest as a secured creditor would have been protected.

15. At the present time, in one breath, CVF asks to have this Court direct that the net proceeds of the sale of the Bonair Star be paid to CVF by virtue of its position as the holder of a secured claim. In the next breath, CVF has filed with this Court a proof of claim which ignores the very provisions of the instruments which it relies upon in its claim for payment.

16. CVF's claim in this proceeding should be governed by the agreements which it entered into with the debtor. CVF's claim should, as a matter of law, be reduced to such sum as represents the net proceeds of the sale of the Bonair Star after the payment of all maritime claims which have priority over the claims of a holder of a chattel mortgage under the Uniform Commercial Code. The documents which establish the basis of the claims of the parties are appended to the proof of claim which CVF has filed with this court.

17. In an act of desperation, CVF claims that Cariven and Vintero are the same entities and that Vintero should be deemed jointly and severally liable with Cariven on the obligation to repay CVF. This allegation is not supported by the facts. Cariven, a Venezuelan corporation, is distinct and separate from Vintero. In point of fact, Cariven has filed a substantial claim with this Court and that claim is the subject matter of a pending objection to claim which has been vigorously defended by Cariven.

18. CVF's final basis of claim is that a contract be implied by law resulting from the unjust enrichment obtained by Vintero at CVF's expense. The proof of claim indicates that CVF is an agency of the Venezuelan Government. As such, CVF has behind it the full resources and wealth of the sovereign state of Venezuela. CVF is a sophisticated entity which negotiated a non-recourse security agreement. CVF and the debtor must abide by their agreements. The security agreements are unambiguous and clear on their face. CVF is attempting in its proof of claim to collaterally attack the July 9, 1980 judgment of this Court and to ignore its unambiguous contractural agreements.

WHEREFORE, applicant prays for an order expunging the claims of CVF in the sum of $12,093,261, all for which no previous application has been made.

Dated: New York, New York
November 2, 1981

VINTERO CORPORATION

By/ _____
Vincent de Lyra, Pres.

United States District Court
Southern District of New York

In the Matter of
VINTERO CORPORATION,
Debtor.
----------X 77 B 2687 (JL)

VINTERO CORPORATION,
Plaintiff,
– against –
CORPORACION VENEZOLANA DE FOMENTO, and VENEZOLANA DE CRUCEROS DEL CARIBE, C.A.,
Defendants.
----------X

SUPPLEMENTAL AND REPLY AFFIDAVIT IN SUPPORT OF CVF'S MOTION FOR SUMMARY JUDGMENT (S.S. BONAIRE STAR)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

GLEN T. OXTON, being duly sworn, deposes and says that:

1. He is a member of the firm of Healy & Baillie, attorneys for Corporacion Venezolana de Fomento (hereinafter "CVF"). He is familiar with the proceedings herein, and he submits this Supplemental and Reply Affidavit in Support of CVF's Motion for Summary Judgment concerning the proceeds of the S.S. BONAIRE STAR, in reply to the papers in opposition submitted on behalf of Marsh & McLennan, Inc.

2. After serving the papers in support of CVF's Motion for Summary Judgment dated October 2, 1981, it came to deponent's attention that there were two injured seamen who had claims allegedly giving rise to maritime liens against the BONAIRE STAR or the proceeds thereof, namely, Julio Squivel James, having a claim in the amount of $3,250 (hereinafter "James") and Miguel Angel Perez, having a claim in the amount of $22,500 (hereinafter "Perez"), both of said claimants being represented by Mr. Seltzer of the firm of Fields & Rosen.

3. Deponent has conferred with Mr. Seltzer and reached a settlement of the claims of James and Perez, and stipulation has been entered into reflecting said settlement ($2,275 on the James claim and $15,750 on the Perez claim), a copy of which Stipulation is annexed hereto.

4. Accordingly, the relief requested herein by CVF is modified as follows:

A. That the balance of the proceeds of the BONAIRE STAR be distributed:

(1) To James in full settlement of his personal injury claim - $2,275;

(2) To Perez in full settlement of his personal injury claim - $15,750; and

(3) The balance of said proceeds, including the interest earned on said proceeds while deposited pursuant to the order of this Court, to CVF.

B. That the debtor's Complaint herein be dismissed.

5. CVF's claim to the proceeds of the BONAIRE STAR is not premature as alleged by Marsh & McLennan. On the contrary, CVF has paid $12,093,261 under its guaranty of Cariven's borrowing, and is, therefore, not entitled to the benefit of the perfected security interest in its favor on the BONAIRE STAR. Any recovery under said security interest will, of course, reduce the potential damages recoverable in the pending action before Judge Sweet in the Southern District.

s/ _____
Glen T. Oxton

Sworn to before me this
14th day of October, 1981

s/ _____
Patricia E. Perez
Notary Public

United States District Court
Southern District of New York

In the Matter of
VINTERO CORPORATION,
Debtor,
----------X 77 B 2687 (JL)

VINTERO CORPORATION,
Plaintiff,

—against—

CORPORACION VENEZOLANA DE FOMENTO, and VENEZOLANA DE CRUCEROS DEL CARIBE, C.A.,
Defendants.
----------X

STIPULATION BETWEEN CLAIMANTS (S.S. BONAIRE STAR)

Corporacion Venezolana de Fomento (hereinafter "CVF") by its attorneys, Healy & Baillie, hereby stipulate and agree with Julio Squivel James (hereinafter "James") and Miguel Angel Perez (hereinafter "Perez"), by their attorneys Fields & Rosen, as follows:

1. James and Perez were both injured aboard the S.S. BONAIRE STAR while employed as seamen on said vessel. Claims were lodged by both James and Perez against the BONAIRE STAR and the Debtor-in Possession, which claims were untimately settled. The claim of James was settled for $3,250, and the claim of Perez was settled for $22,500.

2. CVF is claiming a UCC security interest in the proceeds of the sale of the BONAIRE STAR.

3. CVF claims that James and Perez do not have maritime liens against the S.S. BONAIRE STAR and the proceeds thereof, and are merely unsecured claimants thereto.

4. In order to obviate litigation of the lien question, the parties hereto stipulate and agree that, in the event the Court herein finds that James, Perez and CVF are the only parties entitled to share in the proceeds of the BONAIRE STAR, said proceeds shall be distributed in the following manner:

A. To James, $2,275 in full settlement of his claim.

B. To Perez, $15,750 in full settlement of his claim; and

C. The balance of the proceeds shall be paid to CVF.

Dated: October 13, 1981

CORPORACION VENEZOLANA
DE FOMENTO

By HEALY & BAILLIE

A member of the Firm
Attorneys for Corporacion
Venezolana de Fomento
29 Broadway
New York, New York 10006
(212) 943-3980

JULIO SQUIVEL JAMES
MIGUEL ANGEL PEREZ
By FIELDS AND ROSEN
A Member of the Firm
Attorneys for Claimants
James and Perez
115 Broadway
New York, New York
(212)925-0030

APPENDIX F
SECOND SUPPLEMENTAL AND REPLY AFFIDAVIT IN SUPPORT OF CVF'S MOTION FOR SUMMARY JUDGMENT AND TURNOVER ORDER
(S.S. BONAIRE STAR)

United States District Court
Southern District of New York

In the Matter of
VINTERO CORPORATION,
Debtor,
----------X 77 B 2687 (JL)

VINTERO CORPORATION,
Plaintiff,
— against —
CORPORACION VENEZOLANA DE FOMENTO, and VENEZOLANA DE CRUCEROS DEL CARIBE, C.A.,
Defendants.
----------X

SECOND SUPPLEMENTAL AND REPLY AFFIDAVIT IN SUPPORT OF CVF'S MOTION FOR SUMMARY JUDGMENT AND TURNOVER ORDER (S.S. BONAIRE STAR)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

GLEN T. OXTON, being duly sworn, deposes and says that:

1. He is a member of the firm of Healy & Baillie, attorneys for Corporacion Venezolana de Fomento (hereinafter "CVF"). He is familiar with the proceedings herein, and he submits this Second Supplemental and Reply Affidavit in Support of CVF's Motion for Summary Judgment concerning the proceeds of the S.S. BONAIRE STAR, in reply to the papers in opposition submitted on behalf of VINTERO and the additional papers submitted in opposition on behalf of Marsh & McLennan, Inc.

A. Other Creditors' Claims to the BONAIRE STAR Proceeds.

2. After serving deponent's Supplemental and Reply Affidavit dated October 14, 1981, it came to deponent's attention that there were additional lien claimants to the proceeds of the BONAIRE STAR other than the two injured seamen, notwithstanding the judicial sale of the vessel in Alabama. Accordingly, deponent wrote to eight creditors, based upon a review of the Claims Register, for clarification as to whether a maritime lien was claimed for the amounts alleged to be due, and offered to discuss settlement of such claims. A copy of deponent's letter is annexed hereto as Exhibit A.

3. Among the creditors to whom the aforementioned letter was sent, the following three creditors stated to deponent on the telephone that they claimed no maritime lien:

Claim No. 1 – International Paint Co.

Claim No. 3 – Haber Operations

Claim No. 5 – Stockard Shipping & Terminal Corp.

4. Among the eight creditors to which the above letter was sent, two did not respond at all:

Claim No. 13 – Schenkers International Forwarders ($8,616.96)

Claim No. 14 – ITT World Communications Inc. ($261.45)

5. The remaining three creditors agreed to accept payment of 70% of the face amount of their claim in full satisfaction thereof on the condition that Court approval be obtained and payment be made relatively soon.

Claim No. 6 – Texaco Export, Inc.

Claim No. 7 – Page & Jones Inc.

Claim No. 19 – Unitor Ships Service A.S.

6. In addition, after receiving the Answering Affidavit made by Mr. Vincent DeLyra dated November 13, 1981, deponent telephoned J. Kamil & Co. Inc., a ship chandler located in Mobile, Alabama to whom Vintero concedes indebtedness of $22,517.18 for ship supplies, but for which no proof of claim has yet been filed. Mr. Ungar of J. Kamil & Co., Inc. (or Kamil

Ship Supply Co., as listed in the telephone directory) confirmed that Vintero owes $22,517.18 with respect to supplies provided to the S.S. BONAIRE STAR, and agreed with the undersigned to accept payment of 70% of the face value of its claim after submission of an executed proof of claim and supporting invoices (which are being promptly sent to New York) and approval by this Court of such settlement.

7. A summary of the creditors who are willing to accept CVF's proposed 70% settlement of their respective claims is annexed hereto as Exhibit B.

8. In paragraphs 4 through 12 of his affidavit dated November 13, 1981, Mr. DeLyra refers to 10 claims which are listed below. Although some claims have been discussed above, each one is repeated below for clarity:

A. Claim No. 1 – International Paint Company has stated that it does not claim a maritime lien.

B. Claim No. 6 – Texaco Export Inc. has accepted CVF's 70% proposal.

C. Claim No. 7 – Page & Jones has accepted CVF's 70% proposal.

D. Claim No. 9 – American Bureau of Shipping states in its proof of claim that "9. No security interest is held for this claim". Moreover, upon information and belief, American Bureau of Shipping did not provide necessaries or make repairs to the BONAIRE STAR and, therefore, has no maritime lien.

E. Claims Nos. 10 and 11 – Personal injury claims of Perez and Esquivel. These claimants have agreed to CVF's 70% proposal.

F. Claim No. 16 – The Republic of Panama. An examination of Section 9 of the Proof of Claims suggests that Panama is not asserting that its claim is secured by a maritime lien. In any event, no maritime lien arises under the laws of the United States for tonnage, consular and inspection fees becoming due under the laws of Panama.

G. Claim No. 19 – Unitor Ships Service A.S. has agreed to CVF's 70% settlement proposal.

H. Claim No. 21 – Marsh & McLennan Inc. has appeared in this adversary proceeding. As discussed below, it is CVF's position that it said claimant holds a lien, it is subordinate to the UCC security interest held by CVF.

I. Unfiled claim – J. Kamil & Co. Inc. has agreed to CVF's 70% settlement proposal.

B. In Reply to the Debtor's Motion to Reduce CVF's Claim

9. CVF does not intend to try to enforce any deficiency claim with respect to its UCC security interest in the BONAIRE STAR after receiving whatever monies it may receive from the proceeds of said vessel. The Debtor has tried to obscure the fact that CVF has two separate security agreements with the Debtor. After receiving a small payment from the BONAIRE STAR, and abandoning any deficiency claim with respect to that vessel, CVF's full claim (less the BONAIRE STAR proceeds received) is covered by CVF's security agreement with the debtor with respect to the SANTA ROSA. As discussed in the accompanying memorandum of law submitted by CVF, the SANTA ROSA Security Agreement did not evaporate when this Court held on June 2, 1980 that perfection of CVF's security interest in the SANTA ROSA lapsed by reason of its failure to refile the UCC Financing Statement within four months after movement of the fessel to the state of Maryland. The only remaining asset in the Debtor's state, the proceeds of the liquidation of which would be available for general creditors is the S.S. SANTA ROSA. CVF's SANTA ROSA Security Agreement applies to the entire asset. There is no reason, therefore, why CVF's claim to the SANTA ROSA as a general unsecured creditor should be reduced (except by any amounts from the proceeds of the BONAIRE STAR).

C. In Reply to the Affidavit dated November 13, 1981 Submitted By Marsh & McLennan, Inc.

10. Upon information and belief the personal injury claims of Perez and Esquivel are not based exclusively upon their Jones

Act remedy (46 U.S.C. § 688), but are also based upon a general maritime claim of unseaworthiness, the latter of which gives rise to a maritime lien against the vessel. Such a maritime lien, of course, is silent, no filing or notice being required to perfect it. While the legal issues are not entirely free of doubt, a court would most likely find that these seamen had maritme liens against the S.S. BONAIRE STAR. Moreover, the Debtor does not challenge the lien status of these claims. See DeLyra Affidavit dated November 13, 1981 at page 3, paragraph 8.

11. As to Marsh & McLennan's allegations concerning other actions pending, there are only two matters pending in the United States. The issues remaining before Judge Sweet (76 Civ. 1671) concern only the question of whether Vincent DeLyra or Vintero committed fraudulent acts as viewed under the laws of Venezuela. Final judgments have been entered against CVF with respect to all amounts owed by the DeLyra group to third parties, and CVF has paid said judgments, giving rise to a total claim of $12,093,261. Any recovery made herein by CVF will reduce any damages provable against the defendants in the District Court action.

12. Secondly, an appeal from Judge Pierce's affirmance of this Court's judgment dated July 8, 1980 is pending in the Court of Appeals for the Second Circuit. This appeal, however, is limited to contractual and equitable points and review of this Court's findings with respect to the application of the Uniform Commercial Code herein is not sought. CVF is arguing in this appeal that title to the SANTA ROSA should be deemed to be in either CVF or Cariven.

13. Finally, Deponent does not now know the status of any proceedings brought in Venezuela, but will attempt to obtain such information prior to the hearing date.

WHEREFORE, applicant prays that this Court make an order herein as follows:

A. Dismissing the adversary proceeding brought by the Debtor to have CVF's security interest in the proceeds of the BONAIRE STAR declared null and void;

B. That upon presentation of an excecuted general release in favor of the Debtor (and in the case of J. Kamil & Co. Inc., an executed Proof of Claim and supporting vouchers), the respective settlement amounts be paid from the proceeds of the BONAIRE STAR to the creditors listed on Exhibit B hereto;

C. That the balance of the proceeds of the S.S. BONAIRE STAR, including accrued interest thereon, be paid to CVF in exchange for a receipt therefor; and

D. That the Debtor's motion to reduce CVF's claim with respect to the SANTA ROSA be denied.

_____

Glen T. Oxton

Sworn to before me this
16th day of November, 1981

_____

Notary Public

HEALTY & BAILLIE
20 Broadway
New York, New York 10006
(212) 943-3980

October 16, 1981

To the Claimants Listed on
Schedule A Annexed Hereto

Re: Bankruptcy of Vintero
Corporation, Southern
District of New York,
77 B 2687 (Judge Lewittes)

Dear Sirs:

Please take notice that our client, Corporacion Venezolana de Fomento (hereinafter "CVF"), has moved for a finding that CVF's security interest in the remaining proceeds of the sale of the S.S. BONAIRE STAR (Ex BAHAMA STAR), amounting to abut $207,000 plus accrued interest, is valid and perfected. The security interest arises form a security agreement and a UCC financing statement which was filed with the Secretary of State of Alabama on November 12, 1975, securing payment to CVF of pricipal and interest in the aggregate amount of $12,093,261. CVF has also moved for turnover of said proceeds pursuant to its security interest. The return date for the motion is November 19, 1981 at 11:00 a.m. in Room 201, United States Court House, Foley Square, New York, N.Y.

In order to avoid prolonged litigation, CVF desires to settle with all claimants that hold a lien or security interest in the proceeds of teh BONAIRE STAR which is purportedly senior to that of CVF. Such claimants are urged to telephone the undersigned as soon as possible. Such claimants not desiring to discuss settlement are requested nevertheless to advise the undersigned of their opposition to CVF's turnover request.

Very truly yours,
HEALY & BAILLIE
By
Glen T. Oxton

SCHEDULE A

International Paint Co. (Claim 1)
Morris & Elmwood Avenues
P.O. Box 386
Union, New Jersey 07083

Haber Operations (Claim 3)
Colt Industries
12850 Inkster Road
Detroit, Michigan 48239

Stockard Shipping & Terminal Corp. (Claim 5)
c/o Jerome E. Marks
Deasey, Scanlan & Bender, Ltd.
2900 Two Girard Plaza
Philadelphia, Pennsylvania 19102

Texaco Export, Inc. (Claim 6)
2000 Westchester Avenue
White Plains, New York 10650
Att: P.S. Wise, jr.

Page & Jones, Inc. (Claim 7)
56 N. Royal Street
P.O. Drawer J
Mobile, Alabama 33601

Schenkers International Forwarders (Claim 13)
c/o Gene R. Kazlow
Kazlow & Kazlow
10 East 40th Street
New York, New York 10016

ITT World Communications Inc. (Claim 14)
67 Broad Street
New York, New York
Att: Mr. Louis M. Ascerno

Unitor Ships Service A.S. (Claim 19)
Sorligt 8
Oslo, Norway
c/o Sven A. Johanson
15 Court Square
Boston, Massachusetts 02108

CREDITORS ACCEPTING CVF'S 70% PROPOSAL

Claim No.	Creditor	Face Amount	Settlement Amount
6	Texaco Export Inc.	$ 9,000.00	$ 6,300.00
7	Page & Jones Inc.	1,236.75	865.73
10	Miguel Angel Perez	22,500.00	15,750.00
11	Julio Esquivel	3,250.00	2,275.00
19	Unitor Ships Service A.S.	3,792.15	2,654.50
—	J. Kamil & Co. Inc.	22,517.18	15,762.03

APPENDIX G
OPINION OF SOUTHERN DISTRICT
[Joel Lewittes, Bankruptcy Judge]

United States District Court
Southern District of New York

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In the Matter
-of-
VINTERO CORPORATION,

Debtor,

IN PROCEEDINGS FOR AN ARRANGEMENT

VINTERO CORPORATION,

Plaintiff,

—against—

CORPORACION VENEZOLANA DE FOMENTO and VENEZOLANE DE CRUCEROS DEL CARIBE, C.A.

Defendant.

OPINION

No. 77 B 2687

----------X

APPEARANCES:

FINKEL, GOLDSTEIN & BERZOW, ESQS.
Attorneys for Vintero Corp.
67 Wall Street
New York, New York 10005
HARVEY L. GOLDSTEIN, ESQ., *Of Counsel*
NEAL. M. ROSENBLOOM, ESQ., *Of Counsel*

HEALY & BAILLIE, ESQS.
Attorneys for Corporacion Venezolana De Fomento
29 Broadway
New York, New York 10006
GLEN T. OXTON, ESQ., *Of Counsel*

RUSKIN & GYORY, ESQS.
Attorneys for Venezolane De Cruceros Del Caribe, C.A.
529 Fifth Avenue
New York, New York 10017
DANIEL E. CLIFTON, ESQ., *Of Counsel*

JOEL LEWITTES, BANKRUPTCY JUDGE

This decision is occasioned by a renewed motion for summary judgment by Vintero Corporation ("Vintero"), a Chapter XI debtor, in an adversary proceeding it commenced to determine the validity, priority or extent of alleged liens[1] asserted by two creditors, Corporacion Venezolana de Fomento ("CVF") and Venezolana de Cruceros del Caribe, C.A. ("Cariven"), against a maritime vessel, the S.S. Santa Rosa, a purported asset of Vintero.

This Court previously ruled, *inter alia*, that Vintero's original summary judgment motion could not be sustained, since defendant CVF asserted, in a counterclaim to Vintero's underlying complaint, a material issue of fact, *viz.*, that Vintero did not own the S.S. Santa Rosa at the time of the Chapter XI filing.[2] Accordingly, this Court denied Vintero's summary judgment motion, without prejudice to it to renew such motion, either at the close of pre-trial discovery, limited to the issue of ownership of the vessel, or at trial.[3] Vintero has chosen to renew its motion at the earlier of the two alternative time frames prescribed by the Court.

A
Undisputed Facts

On November 4, 1977, Vintero filed a Chapter XI petition in this Court in accordance with the terms of the 1898 Bankruptcy Act §322[4] and Bankruptcy Rule 11-6[5]. Included among

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[1] See Bankruptcy Rule 701(2), 411 U.S. 1068, applicable to Chapter XI cases by Bankruptcy Rule 11-16(a)(2), 415 U.S. 1037-38.

[2] It is noteworthy that defendant Cariven, which CVF claims is the owner of the vessel, has denied such ownership.

[3] *Matter of Vintero Corporation*, 1 B.R. 543, 546-7 (S.D.N.Y. 1979) (Bankruptcy Court).

[4] 11 U.S.C. §722. Since Vintero filed its Chapter XI petition in 1977, the provisions of the Bankruptcy Act of 1898 apply and not those of the Bankruptcy Reform Act of 1978. See Title IV, Section 403(a), Pub.L.No. 95-598 (1978).

[5] 415 U.S. 1012.

Vintero's assets is an undocumented[6] maritime vessel known as the S.S. Santa Rosa.

On May 19, 1975, Vintero and CVF entered into a security agreement whereby Vintero granted to CVF a security interest in and to the S.S. Santa Rosa[7] which was at that time berthed on the James River in the Commonwealth of Virginia.

In pertinent part, that agreement recites that Vintero is a New York Corporation, is not a resident of Virginia, and does not maintain a place of busineess in Virginia[8].

On the very day that the security agreement was entered into, a financing statement, designating CVF as a secured party,

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[6] Registration of vessels is governed by 46 U.S.C. §11 *et seq.* For the purpose of such registration, see *e.g. Puamier v. Barge BT 1973*, 395 F.Supp. 1019, 1030 (E.D.Va.1974).

[7] A copy of the security agreement, entitled "First Mortgage of Undocumented Vessel", naming Vintero Sales Corporation (now Vintero Corporation) as mortgagor and CVF, for the account of Cariven, as mortgagee, is annexed as "Exhibit 1" to Vintero's complaint in the underlying adversary proceeding.

[8] We attach no significance, in the case at bar, to a provision in the security agreement that: "Mortgage [CVF] shall have all of the rights and remedies of a secured party under the Uniform Commercial Code or other applicable law...Reference to the Uniform Commercial Code shall mean such Code as in effect in the State of Virginia as amended from time to time."

Although §1-105(1) of the 1962 and the 1972 enactments of the Uniform Commercial Code ("UCC") allows parties to choose the law they desire to govern their transaction, such choice of law does not override the choice of law provisions of UCC §9-103. See *Doyle v. Northrop Corp.*, 455 F.Supp. 1318, 1327-9 (D.N.J.1978). The reason advanced for excluding "the specific choice of law rules regarding creation, perfection and priorities in multistate transactions [UCC §9-103]" (*id* at 1328-9), is that parties to the original agreement may not, by agreement, make their choice of law binding on "creditors and purchasers who were not parties to the original agreement" (*In re Kokomo Times Publishing & Printing Corp.*, 301 F.Sup. 529, 536 [S.D.Ind. 1968]) for whose benefit and protection the perfection requirements are designed. *Cf. Cherno v. Dutch American Mercantile Corp.*, 353 F.2d 147, 152 (2d Cir. 1965).

[9] A security interest is normally "perfected" by the filing of a financing statement. *In re Knapp*, 575 F.2d 341, 343 (2d Cir. 1978).

was filed with the State Corporation Commission at Richmond, Virginia. From that date to the present, no other filing has been effected in any other jurisdiction.

In September 1975, the subject vessel was moved from Virginia to Baltimore, Maryland, where it now rests.

B

Vintero's Contentions On This Motion

Vintero points out that as a debtor-in-possession, it possesses, generally, "all the title and [may] exercise all the powers of a trustee appointed under this [Bankruptcy] Act . . ."[10] Since ". . . the trustee acquires the status of a creditor . . .[existing or hypothetical then holding a lien] as of the time when the petition in Bankruptcy is filed",[11] under the terms of Bankruptcy Act §70c[12], Vintero is similary clothed with such powers. As such, Vintero maintains that it may subordinate the liens of the defendants on the subject vessel on the ground that the security interest thereon was not properly perfected when the Chapter XI petition was filed.

Vintero contends that in applying Article 9 of the UCC to the undisputed facts present here, depending upon the classification of the vessel under the terms of that Code, CVF was required to have perfected its security interest either with the proper filing officers in the State of New York, or with the proper filing officers in the State of Maryland. In any event, Vintero says, since CVF filed in neither state, the security interest is unperfected and must be subordinated to Vintero's "lien" in its statutorily conferred role as a hypothetical lien creditor.

In particular, Vintero maintains that the S.S. Santa Rosa, a maritime vessel, is a type of goods normally used in more than

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[10] Bankruptcy Act §342, 11 U.S.C.§742. See *In re Oceana International, Inc.*, 376 F.Supp. 956, 962 (S.D.N.Y. 1974) (Weinfeld, D.J.); *In re Whitman Center, Inc.*, 285 F.Supp. 199, 206 (C.D.Calif. 1968); *Cf. In re Wilco Truck Rental, Inc. of Fla.*, 446 F.Supp. 79, 80 (N.D.Tenn. 1978). See also 8 Collier on Bankruptcy ¶6.32 [7.5] at 950 (14th ed. 1976).

[11] *Cf. Lewis v. Manufacturers National Bank*, 364 U.S. 603, 607 (1961).

[12] 11 U.S.C. §110c.

one jurisdiction.[13] Although the security interest was filed in Virginia, in accordance with the laws of that Commonwealth, Vintero argues that New York law, *i.e.* the law of the debtor's location, governs the place of filing with respect to mobile goods such as the S.S. Santa Rosa.[14] Under New York law, the proper place of filing of the financing statement is with both the New York Department of State and the County Clerk of New York County,[15] where Vintero, undisputably, has always maintained its sole place of business. CVF's failure to file in accordance with New York law, Vintero contends, renders the former's security interest unperfected and therefore subject to invalidation under Section 70c.

Even assuming that the S.S. Santa Rosa is not normally used in more than one jurisdiction, Vintero still claims that CVF's security interest is unperfected. Vintero points out that when the vessel was moved from Virginia to Maryland, it was incumbent upon CVF, under the UCC, to re-perfect its security interest within four months from the time the S.S. Santa Rosa was brought into Maryland by filing a financing statement in that state.[16] Again, CVF's failure to file, under these circumstances, in Maryland, requires a finding that CVF's security interest in unperfected.

C

CVF's Response

CVF seeks to avoid Vintero's proposed Hobson's choice, just described, by arguing, in part, that there is a genuine and material issue of fact, as to the ownership of the vessel, which precludes the granting of summary judgment.[17]

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[13] UCC §9-103(2) (1962 Code); UCC §9-103(3)(a)(1972 Code).

[14] 2A Va Code §8.9-103 (3)(b)(supp. 1979).

[15] N.Y. Uniform Commercial Code §9-401(c) (McKinney).

[16] Md. [Commercial Law] Code Ann. §9-103(3). See also *Wind v. Westinghouse*, - Pa.Super. -, 394 A.2d 980, 982-3(1978).

[17] As noted earlier, this Court denied Vintero's original summary judgment motion and granted CVF time to conduct pre-trial discovery on the issue of the ownership of the S.S. Santa Rosa. See footnote 3, *ante*.

CVF has alleged, in its amended answer to Vintero's complaint in the underlying adversary proceeding, that Vintero acted as Cariven's agent in purchasing the vessel which is the subject of the security interest under attack here. Since Cariven, according to CVF, is the equitable owner of the S.S. Santa Rosa, even assuming Vintero to be correct that it is a good used normally in more than one jurisdiction, New York law would not apply since Cariven has no office or place of business in any of these United States. Thus, CVF observes, no filing was required in New York.

CVF's response to Vintero's alternative argument, that the former was required to re-perfect its security interest in Maryland, within four months from the date the vessel was removed from Virginia to Maryland, is grounded upon UCC §9-401(2). That section provides that

> "A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regards to any collateral as to which the filing complied with the requirements of this Article and is also effective with regard to collateral covered by the financing statement *against any person who has knowledge of the contents of such filing statement.*[18]

CVF claims that since Vintero had knowledge of the content of the filing of the financing statement in Virginia, which filing was made in good faith and in accordance with the laws of Virginia, Vintero is estopped from maintaining here that the security is unperfected as to it.

This argument is without merit. Although it is arguable that a debtor-in-possession is an entity distinct from the debtor[19]

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[18] Emphasis supplied. Presumbaly, CVF's argument in this regard, is addressed, as well, to Vintero's claim that a filing in New York is required.

[19] See *Allegaert v. Perot*, 548 F.2d 432, 435 (2d Cir.), *cert. denied*, 432 U.S. 910 (1977). See also In re CRS Architectural Metals Corp., 1 B.R. 729, 731-2 (E.D.N.Y. 1979) (Bankruptcy Court). But see *In re Unishops*, 543 F.2d

(which presumably had knowledge of CVF's filing), we need not, dispose of CVF's contention on that ground. As we noted earlier, the debtor-in-possession, as of the date of the Chapter XI filing, acquires the status of a hypothetical lien creditor[20] who cannot, obviously, be deemed chargeable with the personal knowledge required by the terms of UCC §9-401(2). Accordingly we must turn to CVF's contention that there is a genuine issue of fact with respect to the ownership of the vessel. To be sure, the materiality of that fact is not as circumscribed as CVF claims - its effects on the alleged requirement to file in New York. The significance of ownership is that Vintero may resort to the "strong arm" clause of Bankruptcy Act §70c in order to subordinate CVF's security interest *only* if the vessel indeed is the property of Vintero.[21]

D

Is There A Genuine And Material Issue of Fact With Respect to Ownership of the S.S. Santa Rosa?

We take note, as did the Court in *Fosen v. United Technologies Corp.*,[22] that

> "The Second Circuit has frequently emphasized that a party opposing a summary judgment motion cannot merely rely on the allegations in his complaint but must provide factual material that either raises a question regarding the veracity of the movant's claims or

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1017 (2d Cir.1976) where the Court cautioned that "...the language in *Shopmen's Local Union No. 455 etc. v. Kevin Steel Products, Inc.*, 519 F.2d 698, 704 (2d Cir. 1975), stating that '[a] debtor-in-possession under Chapter XI...is not the same entity as the pre-bankruptcy company' should not be extended as a generalization in cases other than those involving labor collective bargaining agreements...We noted in *Truck Drivers Local Union No. 807 v. The Bohack Corporaion*... 541 F.2d 312, 320, 2 Cir., that the language used should be so limited." *id* at 1018,19.

[20] *Cf. Lewis v. Manufacturers National Bank, supra* at 607.

[21] *Matter of Vintero Corporation*, supra at 546.

[22] 484 F.Supp. 490 (S.D.N.Y. 1980).

> presents countervailing facts . . . Even *after* conducting discovery in this case, . . . [CVF] . . . [has] done neither."[23]

The foundation upon which CVF grounds its claim that Vintero is not the owner of the S.S. Santa Rosa, but merely purchased the vessel as agent for Cariven, is a provision in a contract entered into between Cariven and Vintero.[24] A copy of that contract is annexed as an exhibit to CVF's counsel's affidavit in opposition to the instant motion.[25] The purportedly pertinent provision of that contract, relied upon by CVF, states that

> "VINTERO agrees to *purchase for the account of* CARIVEN . . . the S.S. Santa Rosa . . ."[26]

Although normally a dispute with respect to contract interpretation precludes the granting of summary judgment, particularly where an issue with respect to the parties' interest is raised,[27]

> ". . . where, as here, 'the intention of the parties may be gathered from the four corners of the instrument'; "in such situations, 'interpretation of the contract is a question of law, and parol evidence is not admissible as an aid in interpretation; [and] no trial is necessary to determine the legal effect of the contract.'

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[23] *Id.* at 502. (emphasis in text) (citations omitted).

[24] It is not disputed that the contract was drafted without benefit of counsel.

[25] Query as to whether counsel's affidavit, the only one submitted by CVF in opposition to Vintero's renewed summary judgment motion, which avers no more than the affiant is "familiar with the proceeding herein", is sufficient under the terms of Fed. F. Civ. P. 56(e). *Cf. Grenader v. Spitz*, 390 F.Supp. 1112, 1116 (S.D.N.Y. 1975), *reversed on other grounds*, 537 F.2d 612 (2d Cir. 1976).

[26] Paragraph "Second", contract between Cariven and Vintero. (emphasis supplied).

[27] *Friedman v. Meyers*, 482 F.2d 435, 439 (2d Cir. 1973). *Cf. Hahn v. Sargent*, 523 F.2d 461, 468 (1st Cir. 1975). *cert. denied*, 425 U.S. 904 (1976).

General Phoenix Corp. v. Cabot, 300 N.Y. 87, 92, 89 N.E. 2d 238, 241 (1950)."[28]

A reading of the contract, as a whole, unambiguously reveals an agreement between Cariven and Vintero that the latter would purchase the S.S. Santa Rosa, *inter alia*, for the former renovate the ship and deliver it to Cariven in Venezuela *provided* that Cariven fulfilled its obligations under that contract.[29] Such contract cannot, in any manner, be construed to create an agency relationship between Vintero and Cariven. Although usually the existence and scope of a principal-agent relationship is one of fact,[30] "[i]f the question of agency is not open to doubt [as here], it is one for the Court."[31]

The essence of an agency relationship is the exercise of control by the principal over the conduct of an agent.[32] The contract between Cariven and Vintero negates any such control by the former over the latter. That contract pertinently provided that Vintero: (1) generally had the option to select where the vessel would be placed in dry dock[33]; (2) had complete independence and control with respect to the vessel's repair and

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[28] *Leslie Fay, Inc. v. Rich*, 478 F.Supp. 1109, 1113-1114, (S.D.N.Y. 1979). (emphasis in text).

[29] Neither Cariven nor CVF has disputed, by resort to evidentiary materials admissible under Fed. R. Civ. P. 56(e), the affidavit of Vintero's principal that Cariven breached the latter's contractual obligations to the former. Thus no issue of fact has been raised by Cariven or CVF requiring a trial with respect to Cariven's breach. *Cf. El Hoss Engineer and Transcport Co. v. American Indepedent Oil Co.*, 289 F.2d 346, 351 (2d Cir. 1961).

[30] But see *Karavos Compania v. Atlantico Export Co.*, 588 F.2d 1, 7 (2d Cir. 1978).

[31] *Hedeman v. Fairbanks, Morse & Co.* 286 N.Y. 240, 248 (1948) (*cited in Cramer v. Hoffman*, 390 F.2d 19, 23 [2d Cir. 1968]).

[32] Restatement (Second) of Agency §1, 14b (1958). See also 2 N.Y. Jur. §1 at 471 (1979) (*citing Wasilowski v. Park Bridge Corp.*, 156 F.2d 612 [2d Cir. 1946]); *In re Parker Ave. Associates*, 1 B.R. 286, 291 (E.D.Pa. 1979) (Bankruptcy Court).

[33] Contract, Paragraph "Second", "Stage No. 1".

and renovation, as well as replacement of its interiors[33]; and (3) had the right not only to insist on one week's notice by Cariven prior to permitting Cariven to have access to the vessel, but retained, as well, the absolute right to refuse such access in the event of Cariven's breach of its obligation for payments under the contract.[35] Moreover, the full-risk insurance policy on the vessel was contractually required to name CVF as beneficiary "jointly with CARIVEN and VINTERO."[36]

In the absence, as here, of any supporting evidence to show any agency relationship between Cariven and Vintero, or any other state of facts negating Vintero's ownership of the vessel, we must conclude, as a matter of law, that Vintero is the owner of the S.S. Santa Rosa and that accordingly there is no genuine issue of material fact requiring a trial.[37]

E

Is Summary Judgment Proper Here?

Our conclusion that there are no triable issues of fact[38] is, however, only one of the two requisite determinations to be reached on a motion for summary judgment. The second necessary prong of our inquire here, is an examination of "the undisputed facts to determine whether they establish that 'the moving party is entitled to judgment as a matter of law.' Fed. R.C. P.56(c)."[39]

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[34] *Ibid*

[35] Contract, Paragraph "Twelfth". But see footnote 29, *ante*.

[36] Contract, Paragraph "Fourteenth".

[37] *Cf. Eberhardy v. General Motors Corp.*, 404 F.Supp. 826, 829 (M.D.Fla. 1975).

[38] CVF, in its local rule 9(g) statement (S.D.N.Y.R 9[g]), includes a triable issue of fact (1) that the debtor (Vintero) did not own the S.S. Santa Rosa at the time Vintero filed its Chapter XI petition. We have determined that issue here adversely to CVF. CVF's second claimed genuine issue relates to whether the vessel was in the actual or constructive control of Vintero at the time of the Chapter XI filing. This issue was resolved adversely to CVF in a previous ruling of this Court. See *Matter of Vintero*, 1 B.R. 543, 545 (S.D.N.Y. 1979)(Bankruptcy Court)

[39] *S.E.C. v. Research Automation Corp.*, 585 F.2d 31, 35 (2d Cir. 1978).

F (1)

Choice of Law: The Problem Stated

In order to determine, under the undisputed facts present here, whether or not the security interest in the S.S. Santa Rosa is perfected as against Vintero, in its statutorily created role of a hypothetical lien creditor, we must look to state law which "governs the secured interests asserted by parties in bankruptcy."[40] The determination as to which state law governs, in this regard, normally is ascertained by reference to UCC § 9-103 (multiple state transactions) or UCC § 9-102. Here, however, resolution of that question is exacerbated by the fact that New York and Virginia, the two forums which originally had material contacts with the security interest, at the moment of its creation,[41] at that time, had adopted different versions of Article 9 of the UCC: New York was then governed by the 1962 Uniform Commercial Code;[42] Virginia was subject to the revised 1972 Uniform Commercial Code.[43] These disparate versions, with respect to the issues involved here, impact quite differently upon the choice of law to be applied.[44] However, for the reasons now to be stated, we are convinced that either under the terms of the 1962 Code, or the 1972 revision thereof, Virginia law applies.

(2)

Virginia Law Applies Under the 1962 Code

Vintero, as noted earlier, first contends that New York law governs the security interest here under the terms of the New York Uniform Commercial Code § 9-103(2) (1962 Code). That section

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[40] *Matter of Bollinger Corp.*, 614 F.2d 924, 925 n.1 (3d. Cir. 1980).

[41] May 19, 1975.

[42] New York did not amend its UCC Article 9, to conform to the revised 1972 Article 9, until 1977, effective July 2, 1978. See N.Y. Uniform Commercial Code § 11-101 (McKinney Sup. 1979).

[43] Virginia adopted the 1972 revision of Article 9 of the UCC on July 1, 1974, prior in time to the creation of the subject security interest. See 2A Va. Code § 8.11-101 (Supp. 1979).

[44] None of the parties addressed this problem or aided this Court in the analysis which follows.

provides that[45]

> "If the chief place of business of a debtor is in this state [New York], this Article governs the validity and perfection of a security interest and the possibility and effect of proper filing with regard to general intangibles or *with regard to goods* of a type which are normally used in more than one jurisdiction (such as automotive equipment, rolling stock, airplanes, road building equipment, commercial harvesting equipment, construction machinery and the like *if* such goods are classified as *equipment or classified as inventory by reason of their being leased by the debtor to others. Otherwise*, the law (including the conflict of laws rules) of the jurisdiction where such chief places of business is located shall govern..."[46]

Vintero argues that since the S.S. Santa Rosa is an ocean going maritime vessel, normally used in more than one jurisdiction,[46] and the chief place of Vintero's business is undisputably located in New York, the just quoted section governs.

Vintero's argument, however, critically omits reference to that portion of § 9-103 which requires that such mobile goods, normally used in more than one jurisdiction, must, in order for that provision to apply, be "classified as equipment or classified as inventory by reason of their being leased by the debtor to others."[47]

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[45] Emphasis supplied.

[46] CVF disputes this contention by arguing that, in its present state of disrepair, the S.S. Santa Rosa is a "dead ship" incapable of being used in more than one jurisdiction. However, the Official Comment to 1962 Code § 9-103, Par. 4, pertinently observes that we should "[n]otice that the rule of subsection (2) [§ 9-103] applies to goods of a type 'normally used' in more than one jurisdiction; there is no requirement that particular goods be *in fact used* out of state." (emphasis supplied). See also *In re Dennis Mitchell Industries, Inc.*, 419 F.2d 349, 358 (3d Cir. 1969).

[47] Classification of goods is intended primarily for purposes of determining which set of filing requirements is proper. See *In re Laminated Veneers Co.*, 471 F.2d 1124, 1125 (2d Cir. 1973). It should be noted that the 1972 revised Code and, as observed earlier, adopted by Virginia, was not amended with respect to classification of goods under UCC § 9-109.

Uniform Commercial Code § 9-109, however, classifies goods, *inter alia* as: "equipment" if they are used or bought for use primarily in business..."[48]; "inventory," if they are held by a person who holds them for sale or lease or to be furnished under contracts of service..."[49] No other classification in UCC § 9-109 is arguably applicable here.[50]

Vintero, in its Chapter XI petition filed with this Court, describes itself, *inter alia*, as a broker.[51] Moreover, the contract of sale, between it and Cariven, by the terms of the contract, provides that the former was to purchase several vessels, including the S.S. Santa Rosa, for ultimate sale to Cariven. Thus the vessel here was held or was being prepared for eventual sale and accordingly must, under the facts present here, be classified, not as "equipment", but as "inventory" for sale.[52]

However, as noted above, if § 9-103(2) (1962 Code) governs here, it requires the choice of law of New York *only* if such goods are "of a type which are normally used in more than one jurisdiction" *and* "if such goods are classified [either] as equipment or...inventory by reason of their being *leased* by the debtor to others."[53] Thus even if we assume, *arguendo*, that Vintero is correct that the vessel is one normally used in more than one jurisdiction, it is clear that such vessel, under the circumstances here, can neither be classified as equipment nor inventory for lease and does not, therefore, fall within the requisite classification of § 9-103(2) (1962 Code).

Since we do not look to New York law under that subsection, and because no other subsection of § 9-103 (1962 Code) is applicable here,[54] no guidance, with respect to the governing

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[48] UCC § 9-109(2).

[49] UCC § 9-109(4).

[50] The two remaining classification of goods in UCC § 9-109 are "consumer goods" (§ 9-109[1]) and "farm products" (§ 9-109[3]).

[51] Petition, Par. 4.

[52] See *e.g.* Official Comment, Par. 3 to UCC § 9-109.

[53] Emphasis supplied.

[54] *E.G.* § 9-109 (3) (1962 Code) refers to personal property brought into the forum state (New York).

choice of law is ascertainable from § 9-103 (1962 Code).

We must therefore, turn to § 9-102 (1962 Code), and the Official Comments[55] which "make it clear that [in general] the state where the collateral is located should be the controlling law, without regard to possible contacts in other jurisdictions."[56] Accordingly, under the 1962 Code, applicable in New York at the time of the creation of the security interest, we are required to look to the law of Virginia, the law of the state where the vessel, on May 19, 1975, was located.

(3)

Virginia Law Applies Under The 1972 Revision Of The Code

It is clear that *if* the S.S. Santa Rosa, under the 1972 Code, in effect in Virginia at the time the security interest was granted, is classified as "equipment" or "inventory leased or held for lease by the debtor to others"[57] New York law would apply.[58] However, since the section of the UCC, relating to classification of goods was not changed in the 1972 Code revision,[59] and because we have determined that the vessel does not fall within the requisite classification just stated, under the 1972 Code, New York law does not govern perfection.

We turn then to the 1972 Code revision § 9-103 (1) (a) which is applicable, *inter alia*, to "goods other than those covered by...mobile goods [just] described in subsection (3)...."[60] In subsection (b) of § 9-103 (1) it is provided that

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[55] Official Comment to UCC § 9-102 (1962 Code), Par. 3. See also Official Comment to UCC § 9-103 (1962 Code), Par. 1.

[56] *United States* v. *Summerville*, 211 F. Supp. 843, 846 (W.D.Pa. 1962), *aff'd* 324 F.2d 712 (3d Cir. 1963), *cert. denied*, 376 U.S. 909 (1964).

[57] 2A Va. Code § 8.9-103 (3) (a) (Supp. 1979).

[58] 2A Va. Code § 8.9-103 (3) (b) (Supp. 1979) provides that "[t]he law (including the conflict of laws rules) of the jurisdiction in which the debtor is located govern[s] perfection and the effect of perfection or non perfection of the security interest" if such goods are classified as those falling within § 8.9-103 (3) (a).

[59] See footnotes 43-45, *ante*.

[60] 2A Va. Code § 8.9-103 (1) (a).

> "Except as otherwise provided in this subsection [1], perfection and the effect of perfection or non perfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected."[61]

Thus the 1972 Code revision, adopted by Virginia, under the circumstances here, directs us to the law of the jurisdiction where the collateral is when the last event occurs on which the claim is based.

(4)

The "Last Event"

It is clear that Maryland is the jurisdiction where the vessel was located when allegedly the last event (unperfection) occurred on which Vintero's claim is grounded. Therefore, as just noted, Virginia law directs us to apply, in this case, the law of Maryland.

To date, Maryland has not adopted the Article 9 provision of the 1972 Code revision and is governed by the 1962 Code. The applicable section in Maryland's UCC provides:

> "....If the security interest was already perfected under the law of the jurisdiction where the property was when the security interest attached [Virginia] before being brought into this State [Maryland], the security interest continues perfected in this state for four months and also thereafter if within the four months period it is perfected in this state. The security interest may also be perfected in this state after the expiration of the four month period; in such case perfection dates from the time of perfection in this state...."[62]

It is clear that in applying Virginia law, the security interest was perfected in Virginia when the security interest attached

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[61] 2A Va. Code § 8.9-103 (1) (b) (Supp. 1979).

[62] Md. [Commercial Law] Code Ann. § 9-103 (3).

and before being brought, in September 1975, into Maryland.[63] It is equally certain that CVF did not perfect its security interest in Maryland within four months from September 1975, when the vessel was brought into Maryland from Virginia. Accordingly, the security interest, "not re-perfected in Maryland,...became unperfected at the end of the four month period...."[64] Pursuant to the terms of Maryland's Uniform Commercial Code § 9-301 (1) (b), such unperfected security interest is subordinate to the rights of " [a] person who becomes a lien creditor without knowledge of the security interest and before it is perfected."

We have noted earlier that a debtor in possession generally "shall have all the title and exercise all the powers of a trustee appointed under this title...."[65] Since "...the trustee acquires the st. .s of a creditor...[existing or hypothetical, then holding a lien] as of the time when the petition in L kruptcy is filed"[66] — at which time the security interest was unperfected in Maryland — CVF's lien is, as a matter of law, subordinated to Vintero's.

Accordingly, Vintero is entitled to summary judgment against CVF.

G
Cariven's Opposition To Vintero's Motion For Summary Judgment

Cariven seeks to avoid subordination of its claimed security interest in the S.S. Santa Rosa[67] by asserting that Vintero

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[63] 2A Va. Code § 8.9-401 (c) (Supp. 1979).

[64] *Wind v. Westinghouse Credit Corp.*, — Pa. Super., — 394 A.2d 980, 983 (1978) (citations omitted).

[65] Bankruptcy Act § 342, 11 U.S.C. § 742; *In re Oceana International Inc.*, 376 F. Supp. 956, 962 (S.D.N.Y. 1974).

[66] *Cf. Lewis v. Manufacturers National Bank*, 364 U.S. 603, 607 (1961).

[67] Cariven's proof of claim, filed in this Court, alleges that the consideration for tis claim was funds advanced by a letter of credit to Vintero and a chattel mortgage executed by Vintero. The proof of claim further alleges that the security interest held for Cariven is the chattel mortgage on the S.S. Santa Rosa.

breached a material condition in a letter of credit, dated May 15, 1975, whereby The Merban Corporation ("Merban") (the lender) opened an irrevocable letter of credit for the account of Cariven (the borrower) in favor of Vintero. The condition, allegedly breached by Vintero is that Vintero, according to Cariven, was requried to properly file a financing statement in order to perfect the security interest. Cariven contends that Vintero's failure to properly perfect and thus comply with the condition of the letter of credit, cannot be turned around now by Vintero to nullify Cariven's lien with respect to the vessel.

The critical provision of that letter of credit, relied upon by Cariven, in support of its claim, reads that

> "(a) Fifty percent (50%) of credit amount against signed statement from Merban Corporation that they *received a duly recorded first mortgage* issued by VINTERO SALES CORPORATION in favor of CORPORACION VENEZOLANA DE FOMENTO, CARACAS, VENEZUELA [Cariven]."[68]

We cannot, in any manner, from the plain and unambiguous terms of that provision[69] discern any requirement other than that Vintero was required to file the mortgage. This it undisputably did and, as we noted earlier, the security interest indeed was properly perfected under the laws of Virginia. When, however, the vessel was removed to Maryland, CVF, the secured creditor, was required to re-perfect the security interest in Maryland within four months after its removal to that state. To be sure, the underlying rationale for the "four month" rule is that "[a] *secured party* is allowed four months to find the debtor and collateral, and file in the new state, without losing the original perfection accorded him in the first state."[70] Clearly, the terms of the letter of credit,

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[68] Emphasis supplied.

[69] See *Leslie Fay, Inc. v. Rich*, 478 F. Supp. 1109, 1113-1114 (S.D.N.Y. 1979).

[70] *In re Automated Bookbinding Services, Inc.*, 471 F.2d 546, 555 (4th Cir. 1972) (emphasis supplied). Thus, "...the four months' period...begins to run whether or not the secured party has notice that the collateral has been removed to another jurisdiction...." *In re Dennis Mitchell Industries, Inc.*, 419 F.2d 349, 358 (3d Cir. 1969). (citations omitted).

relied upon by Cariven, do not alter this analysis.

H
Conclusion

For the foregoing reasons, the plaintiff, Vintero, is entitled to summary judgment against the defendants pursuant to Fed. R. Civ. P. 56. The parties are directed to settle an order on three (3) days notice in conformity with this decision.

JOEL LEWITTES
Bankruptcy Judge

Dated: New York, New York
June 20, 1980

APPENDIX H

NON-RECOURSE SECURITY AGREEMENT

The United States of America
Treasury Department
Bureau of Customs

First Mortgage of Vessel

From Vintero Sales Corporation

To Corporacion Venezolana de Fomento, for account of Venezolana de Cruceros del Cario,

To all to whom these Presents shall come, Greeting:

Know ye, that Vintero Sales Corporation, a corporation of the State of New York, in the State of New York and the sole owner of the undocumented vessel cal the "SANTA ROSA", of the *** of 353 gross and 5412 not tons, or thereabouts, of the first part, being justly included to Corporacion Venezolana de Fomento, a corporation of the Republic of Venezuela, in the State of, of the second part in the sum of U.S. $8,720,230.23 (equal to Bolivarco 37,500,000) dollars has for the purpose of accuring the payment of the said debt, and the interest thereon, granted, bargained, sold, and mortgaged and by these presents do grant, bargain, sell and mortgage and grant a security interest unto the said party of the second part, its *** assigns of said or vessel, together with all of her of the masts, bowaprit, boats, anchors, cables, chains, rigging, tackle, apparel, furniture, and all of her necessaries thereunto *** belonging now or hereafter installed. The last official no. of said vessel is official no. **** which vessel, was purchased from the United States pursuant to Sales Contract No. ****** and has the following characteristics:

Length (registered): 540.3'
Breadth (registered: 84.1'
Depth (registered): 27.2'
Full load draft: 27.2'
Displacement tonnage: 20,291
Gross tonnage: 11,353
Deadweight tonnage 0,713
Net tonnage: 5,412
Service speed: 20 knots

To have and to hold the said vessel and nall the other beforementioned appurtenances unto mortgage the said party of the second part and to its assigns, to the sole and only proper use, benefit, and behoof of the said party of the second part and its assigns.

Provided always, and the condition of these presents is such, that if the said party of the first part shall pay or cause to be paid, to the said party of the second part, or assigns, the debt aforesaid, with the interest thereon, at the time or times and in the manner following, to wit: $8,720,930.23 on or before April 30, 1980 payable at offices of party of second part at: Edificio Norte, Centro, Simon Bolivar, Caracas, Venezuela for the account of Venezolana de cruceros del Caribe, C.A. with offices at: Edificio Malvarroa, Local "C", Avenida Arboleda - El Bosque, Caracas, Venezuela then these presents shall be void and of no effect, subject, however, to the provisions hereinafter contained; and the said party of the first part hereby agree to pay the debt aforesaid, and interest theron, and to fulfill and perform each and every one of the covenants and conditions herein contained.

Mortgager hereby warrants that it is not a resident of State of Virginia where the vessel is now located or maintain a place of business in Virginia. Upon default by Morgager in performance of any covenant or agreement herein or in the discharge of any indebtedness to the Mortgagee, or if any warranty should prove untre, Mortgagee shall have all of the rights and remedies of a secured party under the Uniform Commercial code or other applicable law, and all rights provided herein, in the Indebtedness mentioned above, all of which rights and remedies shall, to the full extent permitted by law, be cumulative. Reference to the Uniform Commercial Code shall mean such Code as in effect in the state of Virginia as amended from time to time.

Anything to the contrary notwithstanding contained in this mortgage herein referred to, the Mortgager shall inno event be liable for a money jdugment in the event of a default hereunder, it being understood that the Mortgagee looks to the accurity

provided by this mortgage only and the lien thereof not, however, to be affected in any way.

But if default be made in such payments, or in any one of such payments, or if default be made in the prompt and faithful performance of any of the covenants herein contained, or if the said party of the second part shall at any time decree itself in danger of losing said debt, or any part thereof, by delaying the collection thereof until the expiration of the time above limited for the payment thereof, or if said party of the first part shall sell or attempt to sell said property, or any part thereof, or if the same shall be levied upon or taken by virtue of any attachment or execution against said first party or is said first party shall remove, or attempt to remove, said vessel beyond the limits of the United States, or if said party shall suffer and permit said vessel to be run in debt to an amount exceeding in the aggregate the sum of U.S. $10,000,000 dollars or it said first party shall negligently or willfully permit said property to waste, or be damaged or destroyed, said party of the second part is hereby authorized to take possession of said goods, chattels, and personal property at any time, wherever fond, either before or after the expiration of the time aforesaid, and to sell and convey the same, or so much thereof as may be necessary to satisfy the said debt, interest, and reasonable expenses, after first giving a notice of 20 days, to be given by publication in some newspaper published in Richmond, Virginia, and to retain the same out of the proceeds of such sale; the surplus (if any) to belong and to be returned to said party of the first part.

And it is agreed that on such sale the party of the second part, its executors, administratros, or assigns, may become the pruchasers.

And the said party of the first part does further convenant and agree, to and with the said party of the second part, its executors, administrators and assigns, that it will immediately procure vessel to be insured against loss or damage by fire, and against all marine risks and disasters, in some godd and responsible insurance company or companies, to be selected and approved by the said party of the second part, for an amount at

at least equal to the amount which shall from time to time remain unpaid upon the said indebtedness and interest thereon, and that it will keep such policy or policies renewed from time to time, and keep the same valid at all times for the amount aforesaid; that it will do, suffer, or permit to be done, no act whereby said insurance would be liable to vitiated or forfeited, and that it will immediately assign and deliver to said secon dparty said policy or policies of insurance, having first duly obtained the proper consent of the insurance company or companies to such assignment, and that is will also promptly deliver to said second part the renewal certificates of said plicies as a collateral security for the payment of said indebtedness. And if said first party shall fail to immediately procure, assign, and deliver such policy or policies as aforesaid, or shall at any time fall to immediately renew the same, and deliver the renewal certificates as aforesaid, the said party of the second part, executors, adminisstrators, or assigns, is hereby authorized to procure said vessel to be insured as aforesaid, and to keep the policy or policies renewed; and the amount which shall be considered, and is hereby declared to be, an additional indebtedness hereby intended to be secured, and shall be repaid to said party of the second part, its executors, administrators, or assigns, on demand, and shall bear interest at 12 percent from the time of such payment until repaid.

And it is hereby provided, that is shall be lawful for said part executors and administrators to retain possession of the property hereby mortgaged, and at its own expense to use and enjoy the same until said indebtedness shall become due, unless said second party should at any earlier date declare this mortgage forfeited for nonperformance of any of the covenants herein contained, or by virtue of any authority hereby conferred on said second party.

In testimony whereof, the said party of the first part, Vintero Sales Corporation has hereunto set its hand and seal this 10 day of May in the year one thousand nine hundred and seventy five.

Vintero Sales Corporation

By ----------

President

State of New York)
County of New York) ss:

Be it known, that on this 19 day of May 1975, personally appeared before me, who being duly sworn, deposed and said that he is the president of Vintero Sales Corporation, the corporation which is described in and executed the within instrument, and that he knows the seal of the said corporation, and that is is affixed and was so affixed to the within instrument by order of the board of directors of the said corporation at whose order he signed his name and acknowledged the within instrument to be the free act and deed of the said corporation.